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IN THE

SUPREME COURT OF THE UNITED STATES.

October TERM, 1942

ELIZABETH LIGGETT KENNARD,
Respondent,

v.

ELLA L. WIGGINS,
Petitioner.

No. 224

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION 1.

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INDEX.

	Page
Caption	1
Short statement of judgment to be reviewed	2
Explanatory note	3
Jurisdiction	3
Questions presented	3
Constitutional and statutory provisions here involved	5
Summary statement of the matters involved	6
Summary of primary question presented	7
History of the controversy. Early family history	9
Daughters' suit to construe the Liggett will	10
Decision of state supreme court, affirming will decree; opinion and mandate	14
Later family history, and litigation	15
Statutory right to obtain review of will decree neglected by Mrs. Kennard	16
(1) Mrs. McIntosh's first federal suit	16
(2) The instant suit in the state circuit court, and the companion suit, McIntosh v. Wiggins, in the federal district court	16
(3) The nunc pro tunc motion or suit	17
The instant Kennard case and the companion McIntosh case; prosecution renewed	20
The decision below	22
Opinions and rulings below, and in McIntosh v. Wiggins, a companion case on many points here involved	32
Reasons relied on for allowance of the writ	33
Prayer	36

Cases Cited.

Anderson v. Biddle, 9 Mo. 580 34

Cantwell v. Johnson, 236 Mo. 575, at 600, 601; 139 S. W. 365, at 374 ..... 34, 35

Fiene v. Kirchoff, 176 Mo. 516, at 522, 526, 527; 75 S. W. 608, at 609-611 35

Giozza v. Tiernan, 148 U. S. 657, at 662; 37 L. Ed. 599, at 601 34

Gorman v. Washington University, 62 Sup. Ct. Rep. 962, at 963 33

Harburg v. Arnold, 87 Mo. App. 326 34

Kennard v. Wiggins, 160 S. W. 2d 706 ..... 1, 32

Knox County v. Harshman, 133 U. S. 152, at 154; 33 L. Ed. 586, at 588 34

McIntosh v. Wiggins, 123 F. 2d 316, at 319; 321, 322; certiorari denied March 2, 1942, 62 S. Ct. 800; rehearing denied March 30, 1942, 62 S. Ct. 914 ..... 17, 21, 22, 32, 34, 35

Marshall v. Holmes, 141 U. S. 589, at 596; 35 L. Ed. 870, at 873 34

Missouri ex rel. Mo. Ins. Co. v. Gehner, 281 U. S. 313, at 319-320; 74 L. Ed. 870, at 875, 876 36

Padgett v. Smith, 205 Mo. 122 34

Perkins v. St. L. K. C. & Col. R. R. Co., 143 Mo. 513, at 519; 45 S. W. 260, at 261 34

Perry v. Wiggins, 57 F. 2d 622, at 625; certiorari denied, Oct. 10, 1932; rehearing denied November 7, 1932; 287 U. S. 609 (77 L. Ed. 529) 21

Saunders v. Shaw, 244 U. S. 317, at 320; 61 L. Ed. 1163, at 1165, 1166 36

Scott v. McNeal, 154 U. S. 34, at 45; 38 L. Ed. 896, at 901 ..... 33, 34

Spotts v. Spotts, 331 Mo. 917, at 921, 924, 930-931, 931, 932; 55 S. W. 2d 977, at 978, 980, 983, 983-984 ..... 34, 35

U. S. v. Throckmorton, 98 U. S. 61, at 68; 25 L. Ed. 93, at 96 35
Wiggins v. Perry, 119 S. W. 2d 839, at 843, 842, 843-844, 844 .....18, 19, 35
Wiggins v. Perry, 271 S. W. (Mo.) 815.....2, 3, 14

Statutes Cited.

Section 1 of Amendment XIV to the Constitution of the United States 3, 4, 5, 28, 33, 34
Section 4, of Amendment of 1890, to Article VI of the Constitution of Missouri; Rev. Stats. of Mo., Vol. I, page 127c 3, 5, 29, 33
Section 237 (b) of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 1, 43 Stat. 937 (28 U. S. C. A., § 344)..... 3
Section 240 of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 8 (a, b, d), 43 Stat. 940 (28 U. S. C. A., § 350)..... 3
Section 563, Revised Statutes of Missouri, 1939..... 23
Section 568, Revised Statutes of Missouri, 1939.....6, 28
Section 1200, Revised Statutes of Missouri, 1939.....6, 34
Section 1202, Revised Statutes of Missouri, 1939.....6, 34
Section 3500, Revised Statutes of Missouri, 1939..... 23

Text Cited.

34 C. J., Sec. 782, p. 495..... 34

Rule of Court Cited.

Rule 38 of the Supreme Court of the United States... 3

INDEX TO SUPPLEMENTAL PORTION OF TRANSCRIPT OF RECORD.

	Record Page
Original opinion, July 25, 1941	243
Appellant's motion for rehearing, (filed Aug. 4, 1941).	255
Appellant's motion to withdraw and modify the opinion, (filed Aug. 4, 1941)	274
Suggestions of Charles S. Reber, amicus curiae, (filed Aug. 11, 1941)	289
Reply to suggestions of Charles S. Reber and to appellant's motion for a rehearing and to modify the opinion, (filed Aug. 21, 1941)	300
Appellant's motion for leave to file printed copies of majority and minority opinions in McIntosh case..	305
Copies of above opinions	307
Petition for rehearing in *McIntosh* case	321
First modified opinion, Dec. 16, 1941	351
Appellant's motion for rehearing in respect of the court's first modified opinion, (filed Dec. 26, 1941)..	365
Appellant's motion to transfer, (filed Dec. 26, 1941)..	375
Suggestions in opposition to motion to transfer	381
Additional suggestions of Charles S. Reber, amicus curiae	382
Second modified opinion, Feb. 26, 1942	393
Appellant's motion for rehearing in respect of the court's amended decision rendered Feb. 26, 1942...	406
Appellant's motion to transfer to court in banc in respect of court's decision of Feb. 26, 1942	433
Respondent's suggestions with respect to appellant's third petition for rehearing and appellant's second motion to transfer to the court in banc	435

Overruling of appellant's last above motion for rehearing and motion to transfer..... 440
Motion for stay of mandate (to 5/16/42)..... 441
Stipulation for stay of mandate (to 6/16/42)..... 442
Stipulation re Physical Exhibit 443
Stipulation for further stay of mandate (to July 15, 1942) 444
Amended praecipe 445

IN THE

SUPREME COURT OF THE UNITED STATES.

October TERM, 194.2

ELIZABETH LIGGETT KENNARD,
Respondent,

v.

ELLA L. WIGGINS,
Petitioner.

No. .....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Ella L. Wiggins, respectfully prays that a writ of certiorari shall issue to review the judgment and decree of the Supreme Court of Missouri, Division One, entered on July 25, 1941 (R. 243), in the above-entitled cause (*Kennard v. Wiggins*), being No. 36,396 on the docket of said Supreme Court of Missouri, Division One, to the May Term, 1941, which judgment affirmed a decree rendered by the state circuit court of the City of St. Louis, Missouri, on February 5, 1940. Said judgment of said Division One of said state supreme court was entered on the same day that said court rendered its first decision (opinion) in said cause. Thereafter two modified opinions were handed down, without modifying said judgment. The second or last modified opinion was rendered February 26,

1942 (R. 392-405), and Petitioner's "Motion for Rehearing" and "Motion to Transfer to said Court in banc," addressed to said final decision, were overruled on April 16, 1942 (R. 440-441), after Petitioner's motion for rehearing and motion to modify, addressed to said original opinion, and Petitioner's motion for rehearing and motion to transfer to said court in banc, addressed to said first modified opinion, had been overruled (R. 351, 392).

Short Statement of Judgment to Be Reviewed. The Respondent in the instant petition for a writ (Mrs. Elizabeth Liggett Kennard, née Scudder) brought this action on March 20, 1931 (R. 1), asking that Ella L. Wiggins (defendant in said cause and Petitioner herein for a writ) be required to turn over to Mrs. Kennard a one-twelfth interest in certain real and personal property, together with the rents and profits therefrom, and that Mrs. Wiggins be enjoined from having the benefit of an earlier decree of the State Circuit Court, City of St. Louis, entered June 22, 1923, construing the will of John E. Liggett, affirmed on appeal in *Wiggins v. Perry*, 271 S. W. (Mo.) 815. Upon said will construction decree Mrs. Wiggins bases her claim of right—as tenant for her own life of said interest in said property—to withhold from Mrs. Kennard the possession and rents and profits thereof, here in dispute. Said property derived from trust estates created by the will of said John E. Liggett, father of Mrs. Wiggins and great-grandfather of Mrs. Kennard.

Said state circuit court, by its decree entered in the instant cause, granted to Mrs. Kennard the relief requested by her, and from said decree Mrs. Wiggins duly appealed to the supreme court of Missouri, where Division Number One of said court affirmed said decree of the state circuit court, and on April 16, 1942, denied motions of Mrs. Wiggins for rehearing and to transfer said cause to said state supreme court in banc.

Explanatory note. The supplemental portion of the certified Transcript of Record herein (R. 243-450) was not indexed in the printing of said portion. Therefore, a subject index of said supplemental matter appears among the indices at the front of this Petition.

In this petition and the supporting brief, (for brevity and convenience) references will sometimes be made to Petitioner as Mrs. Wiggins; to Respondent as Mrs. Kennard; to the Certified Transcript of the Record herein as "R. ..."; to the Physical Exhibit filed herein, as "Phy. Ex. ..."; to the early suit in the state courts *Wiggins v. Perry*, 271 S. W. 815 (not officially reported), that construed the Liggett will, as the "will construction suit" or "will suit"; and to the decree of the state circuit court therein as the "will construction decree" or "will decree." Additional convenient references will be made later. All italics herein are ours unless otherwise stated in particular instances.

Jurisdiction. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 1, 43 Stat. 937 (28 U. S. C. A., § 344); also under Section 240 of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 8 (a, b, d), 43 Stat. 940 (28 U. S. C. A., § 350), and under Rule 38 of this Court.

Questions Presented. I. Whether the Supreme Court of Missouri (Division One) denied to Petitioner (Mrs. Wiggins) the "due process of law" guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motion that said Division One of said court transfer the instant case to said entire State Supreme Court (In Banc) as required by the Constitution of Missouri, Article VI; Section 4 of Amendment of 1890; R. S. Mo. 1939, Vol. 1, page 127c, in cases when "a federal question is involved."

II. Whether said state court denied to Petitioner such due process of law, by failing to sustain her contention, supported by the established doctrine of said court and of this Court, that even if Petitioner had been guilty of the alleged fraud in said court, Respondent could not recover against Petitioner in this direct attack in equity to have the disputed paragraph of the will construction decree held void, because Respondent had completely neglected to avail herself of the prompt, available and adequate other remedy, provided by the statutes of Missouri by suing out a writ of error from said state supreme court within three years after she became twenty-one years old,—by which writ she could have obtained complete relief from the alleged consequences of the alleged fraud, accident, or mistake, by having the decree corrected if wrong, and if prejudicial to Respondent.

III. Whether said state court denied to Petitioner such due process of law, by holding and adjudging that the pleadings and proof in the instant case "amply support the judgment below," and accordingly by affirming the decree herein of the state circuit court in favor of Respondent (Mrs. Kennard) and against Petitioner (Mrs. Wiggins), although said decision of said supreme court was not supported by any substantial evidence as against Mrs. Wiggins, and being wholly arbitrary as to her, unlawfully deprived her of her property without due process, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States.

IV. Whether said court denied to Petitioner such due process of law: (1) by arbitrarily and unjustly penalizing her by its decision and judgment, for the acts of the attorney for Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state circuit court to construe the Liggett will in harmony with said contention,—acts for which Peti-

tioner was not responsible in any way; (2) by arbitrarily and unjustly penalizing her for the long delay caused chiefly by Respondent's having neglected to sue out a writ of error within the time allowed by state statute and also caused by said act of the attorney for Respondent's guardian in making on her behalf the above-mentioned affirmative defense; and (3) by arbitrarily and unlawfully holding, contrary to the law and the undisputed evidence, that said guardian ad litem of Mrs. Kennard, in making said affirmative defense "went beyond any authority, he had" and thereby "caused a decree to be entered which limited" her "rights" (R. 404); and by thereupon treating said holding as a basis for the instant decision against Mrs. Wiggins.

V. Whether the raising of the federal question was timely, not having occurred until the case reached the state supreme court.

Constitutional and Statutory Provisions Here Involved. (1) Section 1 of Amendment XIV to the Constitution of the United States providing, in part, that:

> "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(2) Section 4 of 1890 Amendment to Article VI of the Constitution of Missouri; Rev. Stats. of Mo., Vol. 1, page 127c, relating partly to the State Supreme Court.

"*Sec. 4. Case transferred to court in banc, when.*— When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or *when a federal question is involved*, the cause, on the application of the losing party, *shall be transferred* to the court for its decision; or *when a divi-*

sion in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

(3) *Revised Statutes of Missouri of 1939:*

"*Sec. 568. Court shall have due regard to directions of will, etc.*—All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them (R. S. 1929, § 567)"; also

(4) *Section 1485,* R. S. Mo. 1919 (carried forward as Sec. 1034, R. S. Mo. 1929, and as Sec. 1200, R. S. Mo. 1939):

"*Writs of error, when to issue.*—Writs of error *upon any final judgment or decision of any circuit court,* or other court of record having concurrent jurisdiction with the circuit court, *in all cases are writs of right,* and *shall issue of course, out of the supreme court* and courts of appeals in vacation as well as in term, subject to the regulations prescribed by law"; also

Section 1487, R. S. Mo. 1919 (carried forward as Sec. 1036, R. S. Mo. 1929, and as Sec. 1202, R. S. Mo. 1939):

"*To issue within one year.*—All writs of error *upon any judgment or decision of any court in any case, whether civil* or criminal, shall be brought within one year after the rendering of such judgment or decision, and not thereafter; *but persons within the age of twenty-one years shall be allowed to bring their writs of error in civil cases within three years after such disability is removed;* * * *."

Summary Statement of the Matters Involved. Supplementing the above "Introductory Statement," the additional facts hereinafter set out are deemed necessary to an adequate "statement" of the matters here involved.

Because the opinion and decree in the instant case represent the culmination of long and varied earlier litigations in the state courts between the parties hereto, this statement, although "summary," cannot be as brief as counsel would have wished.

The form of the instant suit in the state circuit court was a direct attack on a disputed paragraph in the will construction decree, by which the trust portion of a daughter who might die without issue was held to pass to her two surviving sisters in successive life estates, so that Mrs. Wiggins as the last survivor of testator's three daughters was held to own an estate for her own life in the undivided property interest involved. The primary ground of attack was a contention that said disputed paragraph in the will decree did not correctly interpret the intent of the will, which should have been construed to vest the disputed property interests in Mrs. Kennard, and that therefore she had been prejudiced by the decree. Charging such prejudice to have occurred, the instant petition attacked the will decree directly by alleging that said disputed paragraph had been inserted in the will decree through fraud, accident or mistake occurring in the state circuit court, and had been affirmed by the state supreme court, division one, through fraud, accident or mistake occurring in said state supreme court. All these contentions were disputed by Mrs. Wiggins.

The broad questions presented in the instant case to the state supreme court, which had the case (being in equity) for decision *de novo* on Mrs. Wiggins' appeal, was whether under the facts presented by the record the state courts were required to grant Mrs. Kennard the relief she sought —as *against Mrs. Wiggins.*

Summary of primary question presented. In 1923, the circuit court of the City of St. Louis entered a decree (construing the Liggett will) which expressly vested in

Mrs. Wiggins as a life tenant, the trust income here in dispute. Upon appeal from said decree to the Supreme Court of Missouri, the particular paragraph of said decree vesting such rights and in dispute in the instant case, was not presented for review by any assignment of error or contention in briefs, made by any party, except to the extent that Mrs. Wiggins in claiming a fee simple title to her one-third of the trust property, made contentions completely hostile to the existence of any life estate. Upon said appeal, the Supreme Court of Missouri, Division One, did not specifically rule upon said disputed paragraph in the will decree, but by its affirmance left said decree of the circuit court in full force and effect.

In the instant case said disputed paragraph in said 1923 decree is sought to be set aside at the instance of Mrs. Kennard, upon the theory of fraud, accident or mistake committed by Mrs. Wiggins, and the state circuit court in 1940 entered its decree avoiding it. Upon review of said decree in the instant case by the Supreme Court of Missouri, Division One, it found no actionable fraud, accident or mistake to have been committed by anyone, but affirmed the vacation of the decree upon the theory that Mrs. Kennard's guardian ad litem had committed an unauthorized act in the will construction suit,—in which act Mrs. Wiggins in no way participated. Said supreme court thereby attempted to deprive Mrs. Wiggins of income vested in her by the decree of 1923, for no wrong committed by her.

The primary reason here presented for the allowance of the writ, is that the divestiture of Mrs. Wiggins' rights under the prior decree, by a subsequent decree based upon no wrong committed by her, constitutes a taking of property without due process of law.

The particular rulings made by said supreme court in the instant case, which operated to deny to Mrs. Wiggins the due process of law guaranteed to her by Section 1 of

Amendment XIV to the Constitution of the United States and thereby unlawfully deprived her of property decreed to be hers by the will construction decree, will be pointed out later herein and argued in the supporting brief.

History of the controversy. Early family history. John E. Liggett died November 23, 1897, a resident of St. Louis, Missouri, leaving a large estate (then consisting entirely of personal property) placed in trust by his will (R. 393). The trust periods ended April 4, 1916; thereupon the trustees became confronted with the duty to immediately distribute and convey the trust estates in accord with the intent of the will as to the titles passing to the beneficiaries entitled by the will to receive them, namely, testator's three daughters, Cora B. Fowler, Dolly L. Kilpatrick and Ella L. Scott (later Wiggins)—all married women—and his grandson John—son of the deceased son. The life interest of testator's widow had ended with her death on May 15, 1909, before the end of the trust period.

The daughters contended that they were entitled by the will to receive distribution of their respective portions in fee-simple titles, not merely life estates. Through conversions of personal assets left by the will, into real estate, the trust estate to be distributed included real estate located in St. Louis; there was also personal property,—both of large value.

Following the termination of the trusts, the then trustees filed in April, 1916, a separate "accounting" suit in the state circuit court, to which all the daughters and their descendants including Mrs. Kennard, were parties. The decree in said suit allotted to the grandson one-fourth of the trust estate in which he was to share, and three-fourths thereof to the three daughters together with the other trust estate in which the grandson did not share. The one-fourth portion thus allotted to the grandson was distributed to him under said accounting decree,

in fee-simple title (Phys. Ex. 77), but said decree expressly refrained from deciding whether the daughters took life estates or fees in the portions of the trust estates allotted and bequeathed to them, and *expressly reserved to them the right to sue later for the purpose of having said question decided.* The trust assets in which the three daughters benefited equally under the will (each in one-third) consisted of said "three-fourths" plus the other trust assets in which the grandson did not share. The contention of the daughters in the will construction suit, that they took fee titles, was prompted by said reservation in said accounting decree.

Since the attack made by Mrs. Kennard in the instant suit was based upon occurrences in the state circuit court and in the state supreme court in the will construction suit, the relevant facts in that case need to be stated adequately for the purposes of this petition.

Daughters' Suit to Construe the Liggett Will. Whether testator's three daughters were entitled at the end of the trust period to receive distributions in fee-simple titles, or merely for life, depended upon the construction of the following provisions of the will:

(1) The first part of the sentence disposed of the trust portions of the daughters who might die *leaving issue,* by giving said portions, after the death of testator's widow, to the daughters during their lives, in equal portions, "with remainder over as to the undivided share aforesaid, of each one, to the heirs of the body of each one of my said daughters, as their absolute property, per stirpes and not per capita."

The second part of the same sentence (being the herein disputed paragraph in the will) disposed in an entirely different manner, of the trust portion of a daughter who might die (as Mrs. Fowler did) without issue but leaving

both her sisters surviving her, thus: *"but should any of my said daughters die without issue then her portion of said * * * stock herein bequeathed to her for life shall go to the survivor and survivors of my said daughters in equal portions for life, with remainder over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes"* (R. 394).

(2) Another relevant provision was that which gave to the daughters the share of the grandson in case he should die without issue before the termination of the trust, viz.:

> "His share of my estate hereinafter devised and bequeathed to him in this will shall go to such of my said daughters as shall survive him, in equal portions for life, and to *the issue* of such of them as shall then be dead, or shall die thereafter, share and share alike, per stirpes, and not per capita; *and the last of my said daughters being dead the whole of John E. Liggett, Jr.'s share* (he being dead before he arrives at the age of thirty years, without issue), shall go to and become the property of *the issue* of such of my said daughters *as shall die leaving issue* to take per stirpes, * * *"

In May, 1920, the three daughters brought suit in the Circuit Court, City of St. Louis, to obtain a construction of the will, asserting that upon the termination of the trusts created by the will, they took fee titles to their portions of the estates. All of the then existing descendants of the testator were made parties to the suit, including among the defendants: Elizabeth Liggett Scudder (now Kennard), then a minor and a grand-daughter of Dolly L. Kilpatrick; and Mary Lois Perry (later McIntosh), an adult daughter of said Dolly L. Kilpatrick. Mrs. McIntosh was duly served with a copy of the writ and petition but stood mute and did not appear or defend in either of the state courts. Elizabeth Liggett Scudder, then almost fourteen years old,

having also been duly served, appeared and defended by her father as her duly appointed guardian ad litem. He was actively represented by the attorney who also represented other minor defendants, descendants of testator. Said attorney filed answers on behalf of said minor defendants (including Mrs. Kennard, Phys. Ex. *214), in which (and in his trial brief, Phys. Ex. *441-442) he contended that under the will the daughters took life estates only, not fee titles, in their respective shares, but with remainder over to their surviving issue, and

> "*In case there be none, with remainder as to said share to the survivor or survivors of said daughters in equal portions for life, with remainder over in fee upon the death of the last survivor of said daughters to the surviving issue of said daughters, share and share alike, per stirpes.*"

These answers prayed that the court *so* construe the will (Phys. Ex. *214).

The reply of the daughters denied these averments of new matter, putting at issue the above contention for said minor defendants, that *the portion of a daughter who might die without issue would continue to be subject to successive life estates of the surviving daughters until the death of the last daughter to survive* (Phys. Ex. *222).

In accord with procedure proved by the trial judge (Hon. Franklin Miller) to be customary in complicated equity cases, the court announced its general conclusion by filing a written memorandum for counsel (copied at Phys. Ex. 116-117), stating, in substance, that the court construed the will to the effect that the plaintiffs took life estates only with contingent remainders over in favor of the heirs, if any, of the bodies of plaintiffs respectively, * * * and directed counsel for defendants "to draft form

of decree; decree to be entered upon said draft when approved by court and filed." Thereupon the attorney for the minor defendants (including Mrs. Kennard), having taken the leading part for the defendants in the trial, drew forms for decree and submitted his successive forms to opposing counsel until both counsel thought one of them expressed the stated conclusions of the court; it was then submitted by the attorney who drew it, to each of the other attorneys in the case (R. 101-102; Phys. Ex. 146-147), and when approved by them as to form, it was submitted to said trial judge, who examined it, signed it, and handed it for filing to the clerk of said court, (R. 136-137; 290), whereupon it was entered on June 22, 1923, as the decree of said court in said will construction suit (R. 135-137; Phys. Ex. *522; a copy appears at *223-277). Counsel for the daughters did not consent to the entry of said decree (Phys. Ex. *522).

Said memorandum for counsel did not contain express instructions concerning the trial court's view of the intended disposal of the share of a daughter who might die without issue surviving her, so said attorney in drafting said form of decree assumed that the trial court had adopted his above interpretation of the will on said issue, and included it in the form of decree drafted by him (R. 298), at three different places, in adjudging the disposal of the trust portion of each of the three daughters, upon her death. The provision relating to the trust portion of Cora B. Fowler follows, the disputed part being italicized:

> The Fowler portion was adjudged to vest upon her death, absolutely, per stirpes, * * * "in her then surviving issue, if any; but *in default of such issue,* then said property shall go as follows:
>
> (1) *If both her sisters,* Ella L. Wiggins and Dolly L. Kilpatrick, *shall survive her,* then an undivided one-half interest in said property shall go to and

vest in each of said sisters for her life, and *on* the *death of either of them, the undivided one-half interest therein of the one so dying shall go to and vest in the survivor for her life,* and *upon her death the whole of said property* shall *go to and vest absolutely in the then surviving* issue of said Ella L. Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita" (R. 141-142, Phys. Ex. *268; as to the trust portion of Mrs. Wiggins, Phys. Ex. *265; as to the trust portion of Mrs. Kilpatrick, Phys. Ex. *271).

The daughters appealed to the supreme court of Missouri; said cause on appeal was *Ella L. Wiggins et al. v. Mary Lois Perry* (now McIntosh) *et al.*, No. 25,037, to the April Term, 1924, Division One of said court. A copy, almost complete, of the daughters' (appellants') printed "Abstract of Record" is in the Physical Exhibit herein, pages *163-286; also a copy of the daughters' brief (Phys. Ex. *317-408), and of the brief for the guardian ad litem of Mrs. Kennard (Phys. Ex. *287-316). The portions of special interest here, will be stated at appropriate places hereinafter, or in the supporting brief.

No brief filed in the state supreme court in the appeal from the will decree discussed the disputed paragraph in said decree that is attacked and held void in the instant Kennard case.

The appellants (daughters) assigned no error in respect of it. No brief made any specific contention concerning it, nor discussed what the will intended as to the disposal of the trust portion of a daughter who might die without issue leaving both her sisters surviving her.

Decision of state supreme court, affirming will decree; opinion and mandate.

The appeal was decided March 16, 1925, and reported only in *Wiggins v. Perry,* 271 S. W. 815. A copy is at

Phys. Ex., pages 64-112, and of the mandate and judgment, at pages 112-113.

The opinion did not specifically rule on the interpretive correctness of the disputed paragraph of the will decree.

Later Family History, and Litigation. Cora B. Fowler died without issue July 19, 1928; both of her sisters survived her. It is not disputed that thereupon her one-third of the daughters' portion of the trust estates passed under the will construction decree, in equal shares (one-sixth each), to Mrs. Kilpatrick and Mrs. Wiggins, for life.

Mrs. Kilpatrick died August 10, 1928. Her death is the real source of the instant dispute between her granddaughter (Mrs. Kennard) and her daughter (Mrs. McIntosh) on the one side, and Mrs. Wiggins on the other side. Said two descendants of Mrs. Kilpatrick had under said decree received in equal shares Mrs. Kilpatrick's *own one-third* portion of the trust estates (i. e., one-sixth each), but after Mrs. Kilpatrick's death they claimed that under the will they were also entitled to share equally in that one-half of the Fowler one-third (i. e., one-sixth) portion of the trust estates, which admittedly had passed under the decree to Mrs. Kilpatrick for life upon Mrs. Fowler's death; each of said descendants of Mrs. Kilpatrick thus claimed one-twelfth of the trust estates that had passed to the three daughters for life. Mrs. Wiggins claimed that under the will and the will construction decree, she (as the sole surviving daughter) was entitled after the death of Mrs. Kilpatrick to enjoy during her own life the entire one-half of the Fowler (one-third) portion that had passed to Mrs. Kilpatrick for life on the death of Mrs. Fowler.

So the subject matter of the instant suit (and of the other litigation) *between Mrs. Kennard and Mrs. Wiggins,*

was and is one-twelfth of the net income of the daughters' portion of the trust estates, since the death of Mrs. Kilpatrick, and the subject matter of *Mrs. McIntosh's two separate suits against Mrs. Wiggins* in the federal courts was the other and separate one-twelfth, the above derivations of title being identical.

Statutory right to obtain review of will decree neglected by Mrs. Kennard. Mrs. Kennard became twenty-one years old on March 10, 1928 (Phys. Ex. *577). There were then and since then in effect, two Missouri statutes, now Sec. 1200, R. S. Mo. 1939, and Sec. 1202, R. S. Mo. 1939 (copied earlier herein), that gave her the right "as of course" within three years thereafter, to sue out a writ of error from said state supreme court to review said will construction decree and thereby to obtain a review and decision on all of her contentions made in her instant suit.

Mrs. Kennard did not, within said three years, sue out such a writ of error. She had until March 10, 1931, to do so. Instead of suing out a writ of error, present counsel for Mrs. McIntosh and Mrs. Kennard began successive efforts to avoid the effect of the disputed paragraph of the will decree by conducting the following varied proceedings in the federal and state courts, all of which upon final determination have proved futile except the instant suit of *Kennard v. Wiggins.*

(1) *Mrs. McIntosh's first federal suit* against Mrs. Wiggins in the federal district court, decided for Mrs. Wiggins. The record in said case is embodied in the Physical Exhibit herein (*475-553); the decisions of the District Court and Circuit Court of Appeals will be explained later herein, or in the supporting brief. Above case lasted from June 19, 1929, to November 7, 1932.

(2) *The instant suit in the state circuit court, and the companion suit, McIntosh v. Wiggins, in the federal dis-*

trict court. On March 21, 1931, soon after Mrs. Kennard's three-year right to sue out a writ of error in the will case had ended, she and Mrs. McIntosh each filed by the same counsel a suit directly attacking the disputed paragraph of the will decree. A copy of the original petition in Mrs. McIntosh's said second federal suit appears at Physical Exhibit *557-570, and a copy of the first amended petition in the instant *Kennard* suit appears at Physical Exhibit *573-591. Many features of said two suits are identical. Therefore said *McIntosh* suit and its decision in favor of Mrs. Wiggins are of moment here. In it Mrs. McIntosh for the second time invoked the federal jurisdiction without success, in an effort to avoid the binding effect of the disputed paragraph of the will decree. The points relevant here, that were decided in said second suit (*McIntosh v. Wiggins*, 123 F. 2d 316), will be noted later herein (or in the supporting brief) in referring to the instant *Kennard suit.*

(3) *The nunc pro tunc motion or suit* (also referred to as the "nunc pro tunc case"). On March 31, 1933, Mrs. Kennard and Mrs. McIntosh filed in the state circuit court and in the will construction suit their joint motion for a nunc pro tunc order to change the disputed paragraph in the will decree, so that in respect of the Fowler portion of the trust estates in case of her death without issue, the decree would read in accord with their contentions in all of their other litigation against Mrs. Wiggins, i. e., would vest in them in fee titles as of the death of Mrs. Kilpatrick, to the respective undivided one-twelfth interests in the daughters' portion of the trust estates that they have been claiming.

[Soon after the filing of said nunc pro tunc motion it was agreed by counsel for said movants with counsel for Mrs. Wiggins, that pending the nunc pro tunc suit, the instant *Kennard* suit and its companion *McIntosh* suit

(making direct attacks on the will decree) would not be pressed (R. 207-208).]

The nunc pro tunc proceeding involved the following events in said futile efforts to change the will decree, which consumed almost five and one-half years after the filing of the motion, i. e., until September 29, 1938: (a) *On June 12, 1933,* after trial, the state circuit court denied said motion (Phys. Ex. 62); (b) on *June 27, 1933,* said movants filed in the state supreme court their joint petition for a writ of mandamus (R. 191-192), with "suggestions" in support (R. 192), to compel said circuit court to make said requested nunc pro tunc order; (c) said petition in mandamus was denied July 20, 1933 (R. 191); (d) on *September 1, 1933,* the movants appealed to the state supreme court from the adverse decision of the circuit court (Phys. Ex. 160-161), said appeal being entitled *Wiggins v. Perry,* No. 33,582, in the state supreme court (the Physical Exhibit in the instant case is a copy of the appellants' "Abstract of Record" on said appeal); (e) the state supreme court on November 12, 1936, affirmed the judgment below (R. 194; *Wiggins v. Perry,* 119 S. W. 2d 839); (f) *thereafter* movants filed a long series of supplemental motions in said appeal case, as shown in outline by the clerk's minutes (R. 194-195). The consideration of all these motions (which the court overruled) and of the supporting and opposing briefs relating to them (see also R. 196-207 for abstracts of their contents), delayed until September 29, 1938, the sending down of the mandate in the nunc pro tunc case. During this time said two direct attack suits (filed March 21, 1931) lay dormant.

The opinion of the state supreme court in the nunc pro tunc appeal (*Wiggins v. Perry,* 119 S. W. 2d 839) contains the following interpretive comments on portions of the same court's earlier opinion in the will construction suit, and on rulings upon certain contentions for the movants in

the *nunc pro tunc* appeal, that are important in considering the instant petition for a writ of certiorari; the respective contentions for the movants will be stated in connection with each ruling made thereon:

(1) The court declined to construe the will (R. 151; 119 S. W. 2d, at 843), but called attention to the facts: that in the will construction suit the attorney who represented *Mrs. Kennard's* guardian ad litem, in his answer for her, "placed the same construction upon the will * * * as appears in the decree"; and that the same attorney "prepared the decree that was entered upon the circuit court record" (R. 147; 119 S. W. 2d, at 842).

(2) Concerning the contention that adequate support for the requested *nunc pro tunc* entry existed in Judge Miller's memorandum and in the opinion and mandate on the appeal in the will case, the state supreme court said (R. 151; 119 S. W. 2d, at 843-844):

> "Considering the opinion and the memorandum together there may be isolated expressions in the opinion tending to support the construction contended for by movants, but from the opinion *it is clear that the court was at no time attempting to specifically rule as to whether or not the interest of a daughter dying without issue would pass to the surviving daughters successively* for life, *and would not pass to the possession of the surviving issue of a deceased daughter until the death of the last daughter.* The *chief question* before the Court was *whether the three daughters took a life estate or a fee* * * *" (R. 151).

As to the mandate in the above connection, the opinion said (R. 149; 119 S. W. 2d, at 843):

> "It will be noted that this court, in what is commonly called the mandate, adjudged that 'the judgment aforesaid, in form aforesaid, by the said circuit court of the City of St. Louis, rendered, be in all

things affirmed and stand in full force and effect.' There can be no doubt about *what judgment* is referred to in the mandate, or what is commonly called the mandate. There was only one judgment in the will construction suit before this court, and that was the judgment of the circuit court on June 23," (22), "1923" (R. 149). (Emphasis by the court.)

The instant Kennard case and the companion McIntosh case; prosecution renewed: On October 31, 1938, Mrs. Kennard filed her second amended petition herein (R. 2-23), on which this case was tried, and on the same day Mrs. McIntosh filed in the District Court of the United States her amended bill of complaint in her second suit against Mrs. Wiggins. In each of these suits the plaintiff attempted a direct attack on the disputed paragraph in the will construction decree, based chiefly upon the contentions: (a) That said paragraph did not correctly interpret the intent of the Liggett will, which should have been construed to vest the disputed property interest in said plaintiffs, respectively (not in Mrs. Wiggins for life), thereby prejudicing them; (b) that said paragraph had been inserted in the decree through fraud, accident or mistake occurring in the state circuit court, and (c) had been affirmed by the state supreme court through fraud, accident or mistake occurring in said court. In both cases the record facts were largely identical, although *the plaintiffs were differently situated. Mrs. Kennard,* at the time of the will construction suit and decree, was a *minor* defendant (almost fourteen years old), represented by her father as guardian ad litem.

Mrs. McIntosh was an *adult* defendant in the will case, served with a copy of the writ and petition therein. She *had stood mute, without appearing in either state court, or making any attempt to defend, or proving any excuse for not appearing to defend.* Partly for this reason the

United States District Court had held in her first federal suit that the will construction decree, whether right or not in its construction of the will, was res judicata as between her and Mrs. Wiggins (Phys. Ex. *530-532), and upon additional points present in the case had also held that the state circuit court had jurisdiction in the will construction case to enter the judgment that it entered (Phys. Ex. *531-532); and said District Court had adjudged that *Mrs. Wiggins was entitled to the disputed income, being the income since the death of Mrs. Kilpatrick on the other undivided one-twelfth interest in the real estate only constituting part of the trust estates* (Phys. Ex. *538-539). Said court did not construe the will (Phys. Ex. *532).

On Mrs. McIntosh's appeal from said decision the United States Circuit Court of Appeals, Eighth Circuit, had affirmed said judgment (on August 17, 1931), on a point of procedure, but in doing so had stated (*Perry v. Wiggins*, 57 F. [2d] 622, at 625), that:

> "This holding of the court results in no prejudice to the appellant as *we have carefully examined the entire record*, and *are of the view that on the merits the judgment should be affirmed*" [Certiorari denied October 10, 1932; rehearing denied November 7, 1932; 287 U. S. 609 (77 L. ed. 529)].

Mrs. McIntosh's second federal suit involved the income, since the death of Mrs. Kilpatrick, upon the other undivided one-twelfth interest in *both the real and personal property* of the daughters' share of the trust estates. The District Court decided in favor of Mrs. Wiggins.

Upon appeal from said decision and decree to the United States Circuit Court of Appeals, Eighth Circuit, there was a judgment of affirmance in favor of Mrs. Wiggins, October 29, 1941 (*McIntosh v. Wiggins*, 123 F. [2d] 316; certio-

rari denied March 2, 1942, 62 S. Ct. 800; rehearing denied March 30, 1942, 62 S. Ct. 914).

The points decided by said Circuit Court of Appeals, that are pertinent to this Petition for a Writ, will be stated later in the supporting brief.

In the instant Kennard case the record shows (R. 208) an admission by counsel for Mrs. Kennard that, since the filing of the first suit attacking the will construction decree, Mrs. Wiggins has voluntarily caused the disputed part of the income to be set aside in a special fund in a trust company, because said income was in litigation (R. 209). This fund includes all of the income in dispute in the *McIntosh* and *Kennard* cases, except certain dividends upon shares of stock in certain realty companies. The record shows that the amount thus held by said trust company early in 1939 was about $360,000, of which one-half was in dispute in the *McIntosh* case and one-half is involved in the *Kennard* case (R. 210).

The decision below. In the instant case, the state circuit court found and held in favor of Mrs. Kennard and against Mrs. Wiggins, in respect of the income here in controversy. The decree is set out at R. 70-91. There was no opinion and no separate finding of facts; such findings as the trial court made were embodied in said decree.

The substance of the decree was: (a) that under the will, upon the death of Mrs. Kilpatrick on August 10, 1928, Mrs. Kennard became the owner of the herein disputed undivided one-twelfth interest in the trust estates, real and personal; (b) the disputed paragraph of the will construction decree was declared void as between Mrs. Kennard and Mrs. Wiggins, and the latter was permanently enjoined from further asserting any right, title or interest in or to the real or personal property involved, and from collecting any income therefrom by virtue of said dis-

puted paragraph; (c) that Mrs. Kennard was entitled to the possession of said disputed interest in said real and personal property; (d) the decree directed that Mrs. Wiggins transfer to Mrs. Kennard the personal property constituting the disputed interest, and also the rents and profits therefrom, received since the death of Mrs. Kilpatrick, together with all income earned upon said amounts; and (e) the court retained jurisdiction for administrative purposes, to make further orders appropriate to carry the decree into effect. The decree *contained no finding that on the appeal from the will decree, the state supreme court had in fact been deceived by any statements contained in the briefs of counsel in said court.*

The specific grounds upon which the state circuit court rendered said decree need not be stated here, because the instant petition for a writ is directed at the action of the state supreme court upon Mrs. Wiggins' appeal from said decree of the state circuit court, taken on May 29, 1940 (R. 92-93).

The Supreme Court of Missouri (Division One) rendered three successive opinions (decisions) in the *Kennard* case, in which it twice shifted one of the controlling reasons on which it decided the case against Mrs. Wiggins, and once changed substantially another of its original rulings.

The original decision was rendered July 25, 1941 (a copy is at R. 245-254). It held that the judgment below should be affirmed and the cause remanded to the circuit court to make the necessary orders to render it effective (R. 254). The controlling rulings upon which said decision rested and that were challenged by Petitioner, follow:

(1) That the cited Missouri statutes (Sections 563 and 3500, R. S. Mo. 1939) *compelled the conclusion* that *the mere existence* in the Liggett will of the term "heirs of

the body," in relation to remainders following life estates, means that the disputed paragraph in the will construction decree had been wrong in its interpretation of the will (R. 247).

(2) That the construction contended for by Mrs. Wiggins that under the entire will, she had a life estate in said one-twelfth interest, as expressed in the disputed paragraph of the will decree, *is not "tenable"* (R. 249).

(3) That *because the disputed paragraph in the will decree was wrong in its interpretation of the will,* the *attorney for the guardian ad litem* of Mrs. Kennard, *in making the contention expressed in his answer in the will* construction suit, and in asking the circuit court to so construe the will, *had suggested and requested a construction that "turned out to be grievously detrimental* to the interest of the minor defendant" *with the result* "that such construction has deprived the minor defendant" over a long period of time "of the possession of income from 'several hundred thousand dollars' worth of property" (R. 252); and that the duty of the guardian ad litem was "to contend for a construction most beneficial to his ward under all the circumstances, and *he had no authority* to do otherwise" (R. 252). No finding was made that Mrs. Wiggins had been responsible for the insertion of the disputed paragraph into the will decree.

(4) That *certain* quoted *excerpts from the briefs of counsel* in *the appeal from the will decree had made statements,* by reading which *"No judge would even suspect such a construction* as that *contained in the challenged paragraph of the decree"* (R. 251).

(5) That although the disputed paragraph was in the will construction decree and said supreme court had affirmed said decree, *it was "Quite apparent,* if not conceded, *that this court's attention was not directed to the*

disputed construction" (R. 249), and that "whether concealed or not, *it was given but scant attention*, and *there were statements in the briefs*, in effect, *contrary to the construction in the challenged paragraph*" (R. 250).

(6) That the pleadings and proof "Amply support the judgment below *and show that the action of the guardian ad litem by his attorney, in going beyond any authority he had, caused a decree to be entered which limited the rights of his ward*" (R. 253-254).

On August 4, 1941, a "*motion for rehearing*" in respect of said original opinion of the state supreme court rendered July 25, 1941, and a separate "motion to withdraw and modify" said opinion, were duly filed for Mrs. Wiggins. Considered together, they made the following contentions, which will be merely stated here. Those relevant to this petition for a writ will be argued in the supporting brief.

(A) That neither of the cited Missouri statutes have any *mandatory* effect on the construction of the disputed paragraph of the Liggett will, because: (a) both the history and purpose of said statutes demonstrate that they were intended to apply only to conveyances of real estate; (b) as applied to wills of personal property, said statutory meaning of "heirs of the body," if applied, is "only by way of analogy and as a rule of construction" rather than a mandatory rule of property; and (c) said statutory meaning, being a mere court-made rule, yields to "a contrary intent of the conveyor found from additional language or circumstances," and in the Liggett will there is such a clearly expressed contrary intent.

(B) That the meaning of the disputed paragraph of the will, as gathered from its four corners, was before said supreme court for consideration and decision in this *Kennard* case, but said court failed (in effect refused)

to discuss or decide it. This was contrary to the uniform procedure established by said court in earlier analogous cases that said statutory rule of construction would not be applied without first examining the entire will to ascertain whether it expressed an intent not in accord with the statutory rule,—and if it did,—such intent prevailed; that such refusal was a denial of due process, and that the arbitrary and unreasoned statement in said opinion, that the construction contained in the disputed paragraph is not "tenable" (R. 273), amounted to a denial of an interpretation of the will from its four corners and a denial to Mrs. Wiggins of the "day in court" to which she was entitled.

(C) That the rulings of the court were arbitrary, unjust and unsupported by any evidence: in holding that the attorney for Mrs. Kennard's guardian, rather than the circuit court, was legally responsible for the presence of the disputed paragraph in the will decree (R. 275); in holding that the act of said attorney in making an affirmative contention concerning the will was legally unauthorized notwithstanding the fact that in earlier decisions by said court it had treated similar conduct as valid, and without criticism or condemnation of the guardian or attorney involved (R. 277-280); and in holding that the act of said attorney, under the circumstances, constituted a fraud upon Mrs. Kennard (R. 280-281).

(D) That it is indisputable of record: that Mrs. Kennard was herself responsible for most of the long delay (mistakenly attributed by said opinion to the attorney for her guardian), by having neglected to sue out a writ of error within the statutory period and instead of resorting to said available, prompt and adequate statutory remedy, by having expended about five years in futile litigation against Mrs. Wiggins; and that by said conduct she was

guilty of such negligence as in equity forfeited her right to make the instant direct attack in equity on the ground of fraud, because she did not come into court free from her own negligence.

Said motion for rehearing prayed the court to construe the will from its four corners in accord with its said established practice.

On August 11, 1941, said attorney for Mrs. Kennard's guardian, by leave, filed his *"suggestions as amicus curiae"* (R. 289).

On November 5, 1941, by leave of court, Mrs. Wiggins filed in the instant *Kennard* case copies of the opinions of the United States Circuit Court of Appeals, Eighth Circuit, rendered October 29, 1941, in the *McIntosh* case.

First modified opinion of state supreme court. On December 16, 1941, said court entered an order stating that on its own motion the court had modified its opinion in the cause and had overruled Mrs. Wiggins' motion for rehearing and motion to modify said original opinion.

The principal changes made in the original opinion, by said modified opinion, consisted of: (1) The deletion from the original opinion of the names of all counsel; (2) the deletion of the statement regarding what the answer of the guardian ad litem for Mrs. Kennard "might have been" (R. 252) and the substitution therefor of a statement largely broadening the lawful power of the guardian ad litem of a minor defendant as compared with the rigid limitation suggested in the original opinion, but holding that in the instant case the guardian had suggested and asked (and inserted in the draft for decree) a construction that turned out to be grievously detrimental to the ward (R. 360-361); and (3) the insertion, just before the last paragraph of the opinion, of the following:

"Able lawyers differ on the construction of wills and other written instruments, as the case law of all jurisdictions abundantly discloses, and *we should*, we think, *say that by this opinion we do not mean to imply that there was any conscious wrongdoing on the part of anyone connected with the will construction suit. There is nothing in the record to suggest such.* The long and honorable career of all counsel concerned belies such suggestion. *However*, as we see it, *the challenged paragraph in the will construction suit, under the facts, amounted to a constructive fraud upon the rights of the present plaintiff, a minor defendant in that suit.* And *by such fraud*, we *mean representations which cause injury to another*, although the party making the representations did not intend to deceive."

Said opinion did not grant the prayer of Mrs. Wiggins in her motion for rehearing (R. 255), that the court give "due regard" to the intent of the will by construing it "from its four corners" in accord with the state statute (Sec. 568, R. S. Mo. 1939, in effect since 1845,—R. S. Mo. 1845, p. 1086, supra), and with its established practice to do so.

On December 26, 1941, Mrs. Wiggins filed her "motion for rehearing" and "motion to transfer to the Court in banc," in respect of said first modified opinion rendered December 16, 1941.

The grounds of said motion for rehearing, relevant to the instant petition for a writ, were:

(A) That said first modified opinion (decision) unlawfully deprived Mrs. Wiggins of her property without due process of law in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, in that: (a) The assumption in said opinion that the quoted representations (statements) of counsel in their appeal

briefs in the will case *in fact caused the state supreme court to affirm the will decree,* is *not supported by any evidence,* and is therefore wholly arbitrary and unconstitutional; (b) that the decisive ruling in said opinion, that absent actual fraud, *constructive fraud alone* will *suffice to set aside a judgment,* was contrary to the uniform doctrine of said court theretofore firmly established and applied in other cases, as the law in Missouri (R. 368); (c) that said decision was arbitrary and unjust to Mrs. Wiggins in penalizing her for the act of counsel for Mrs. Kennard in making said affirmative defense for Mrs. Kennard's guardian, an act for which Mrs. Wiggins was in no way responsible; and (d) that said decision was arbitrary and unjust in penalizing Mrs. Wiggins for the long delay caused by Mrs. Kennard in neglecting to avail of the prompt and adequate statutory remedy by writ of error from the state supreme court to the state circuit court, in the will case, available to her within three years after she became twenty-one years old.

Mrs. Wiggins' said "motion to transfer" the instant case to the state supreme court in banc rested upon the Constitution of Missouri, Section 4 of the Amendment of 1890, to Article VI (R. S. Mo. 1939, Vol. 1, p. 127c, copied earlier herein), which applied to decisions by a division of said court, and made it mandatory to transfer when a federal question was involved.

Said motion invoked both the discretionary power and the mandatory duty of said court under said constitutional provision, to transfer the case to the entire court. The specific grounds included those contained in said motion for rehearing, also the contention that said modified decision had denied "due process" to Mrs. Wiggins by refusing her earnest request that the court construe the will from its four corners and by a *reasoned* opinion, instead of ruling arbitrarily that her contention concerning the in-

tent, was *"not tenable."* The mandatory duty to transfer was invoked expressly on the ground that the cause involved "a federal question," based on a denial of "due process" (R. 380).

On January 23, 1942, the attorney who had represented Mrs. Kennard's guardian in the will case, filed in the state supreme court, *as amicus curiae, "Additional Suggestions"* in the instant *Kennard* case, asking that there be stricken from said first modified opinion the Court's characterization as "a constructive fraud" upon Mrs. Kennard of the answer he had filed on her behalf in the will case (R. 289-299).

On February 26, 1942, the state supreme court rendered its second modified and final opinion (decision) in the instant *Kennard* case (R. 393-405), and entered its order stating that it did so of its own motion; by the same order it overruled Mrs. Wiggins' said motion for rehearing and motion to transfer that were addressed to the court's first modified opinion rendered December 16, 1941 (R. 392-393).

The only change made in the form of its third (final) opinion rendered December 16, 1941, consisted in the deletion from the second last paragraph of said second opinion of the following:

> "However, as we see it, *the challenged paragraph in the will construction suit,* under the facts, *amounted to a constructive fraud* upon the rights of the present defendant in that suit. And by such fraud, we mean *representations which cause injury to another, although the party making the representations did not intend to deceive"* (citing cases; omitted here),

and in the substitution therefor of the following:

> "However, as we see it, *the challenged paragraph in the will construction suit, under the facts, wrong-*

fully deprived a minor defendant, who is now the present plaintiff, of the possession of the property and the income therefrom as claimed by her in the present cause."

A copy of said decision is reported as *Kennard v. Wiggins,* 160 S. W. (2d) 706.

On March 7, 1942, Mrs. Wiggins, by leave of court, filed her "motion for rehearing" (R. 407-430), and separate "motion to transfer to the court in banc" (R. 429-434), both addressed to said final or second modified opinion (decision).

Said motions carried forward as their grounds, the same grounds assigned by Petitioner's motion for rehearing and motion to transfer, addressed to the first modified opinion.

They will be discussed in the supporting brief, and need not be repeated here.

On April 16, 1942, said state supreme court overruled Mrs. Wiggins' said motion for rehearing and motion to transfer to the court in banc, both relating to said modified opinion of February 26, 1942 (R. 440).

Thereafter, by successive orders of said state supreme court, the mandate of said court was stayed for successive periods to expire with July 15, 1942 (R. 444).

There was filed in said state supreme court a stipulation, set out at record pages 443-444, pursuant to which there was lodged with the clerk of this court as a "Physical Exhibit" herein, the only two available copies of a printed, blue covered, "Abstract of Record" in *Wiggins et al. v. Perry et al.,* No. 33,582, in the supreme court of Missouri, containing 591 pages, which was introduced in evidence at the trial of the instant case in the state circuit court, and which constitutes a substantial part of the record evidence referred to in the foregoing statement and

which is relevant and important in connection with the instant petition for a writ. Said stipulation further provided that said two copies of said Physical Exhibit may be filed in this Court, and may and shall, if this Court shall permit, be considered and treated herein as a physical exhibit constituting part of the certified transcript of record in the above-entitled cause, for the use of this Court in connection with its consideration of this petition.

Opinions and Rulings Below, and in McIntosh v. Wiggins a Companion Case on Many Points Here Involved.

The circuit court, City of St. Louis, did not render an opinion, but entered on February 5, 1940, its decree embodying its findings therein (R. 69-91). The general nature of said decree has been stated above.

The third and final (or second modified) opinion of the supreme court of Missouri, on the appeal of Ella L. Wiggins from said decree, is reported as *Kennard v. Wiggins*, in 160 S. W. 2d 706. The points decided and judgment rendered are explained in the "Statement" herein.

In the companion case, *McIntosh v. Wiggins*, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri handed down no opinion, but announced and filed its Findings of Fact and Conclusions of Law, with Directions for Judgment in favor of Mrs. Wiggins. The opinions (majority and minority) of the United States Circuit Court of Appeals, Eighth Circuit, on Mrs. McIntosh's appeal in said cause, are reported as *McIntosh v. Wiggins*, in 123 F. 2d 316. The decree below was affirmed. Being relevant here as an authority not as a decision below in the instant (*Kennard*) case, the pertinent rulings will be stated in the Argument, in the supporting brief.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Supreme Court of Missouri (Division One) denied to Petitioner the "due process of law" guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motion that said Division One transfer the instant case to said entire court (in banc), as required by the Constitution of Missouri, Article VI; Section 4, of Amendment of 1890; R. S. Mo. 1939, Volume I, page 127c, in cases when a federal question is involved.

Section 4, of Amendment of 1890, to Article VI, of Constitution of Missouri; Rev. Stat. of Mo. 1939, Vol. 1, page 127c.

Gorman v. Washington University, 62 Sup. Ct. Rep. 962, at 963.

Scott v. McNeal, 154 U. S. 34, at 45; 38 L. Ed. 896, at 901.

II. Said state supreme court denied to Petitioner such "due process," by failing to sustain her contention, supported by the established doctrine of said court and of this Court, that even if Petitioner had been guilty of the alleged fraud in said state courts, Respondent could not recover against Petitioner in this direct attack in equity to have the disputed paragraph of the will construction decree held void, because Respondent had completely neglected to avail herself of the prompt, available and adequate other remedy, provided by the statutes of Missouri, by suing out a writ of error from said state supreme court within three years after she became twenty-one years old,—by which writ she could have obtained complete relief from the alleged consequences of such alleged fraud, by

having the decree corrected if wrong, and if prejudicial to Respondent.

Rev. Stats. Mo. 1939, Sections 1200 and 1202.
Spotts v. Spotts, 331 Mo. 917, at 931; 55 S. W. 2d 977, at 983.
34 C. J., Sec. 782, p. 495.
Cantwell v. Johnson, 236 Mo. 575, at 600; 139 S. W. 365, at 374.
Perkins v. St. L. K. C. & Col. R. R. Co., 143 Mo. 513, at 519; 45 S. W. 260, at 261.
Knox County v. Harshman, 133 U. S. 152, at 154; 33 L. Ed. 586, at 588.
Marshall v. Holmes, 141 U. S. 589, at 596; 35 L. Ed. 870, at 873.
Not in point are: Anderson v. Biddle, 9 Mo. 580. Padgett v. Smith, 205 Mo. 122. Harburg v. Arnold, 87 Mo. App. 326.

Arbitrary action by the highest court of a state, prejudicial to a litigant, constitutes a denial of due process.

Scott v. McNeal, 154 U. S. 34, at 45; 38 L. Ed. 896, at 901.
Giozza v. Tiernan, 148 U. S. 657, at 662; 37 L. Ed. 599, at 601.

III. Said court denied to Petitioner said due process, by holding and adjudging that the pleadings and proof in the instant case "amply support the judgment below" and accordingly by affirming the decree herein of the state circuit court in favor of Respondent and against Petitioner, although said decision was not supported by any substantial evidence as against Petitioner, and being wholly arbitrary as to her, unlawfully deprived her of her property without due process, in violation of said Amendment to the Federal Constitution.

Section 1 of Article XIV of the Amendments to the Constitution of the United States.
McIntosh v. Wiggins, 123 F. 2d 316, at 319, 321, 322.

U. S. v. Throckmorton, 98 U. S. 61, at 68; 25 L. Ed. 93, at 96.
Cantwell v. Johnson, 236 Mo. 575, at 601; 139 S. W. 365, at 374.
Wiggins v. Perry, 119 S. W. 2d 839, at 844.

IV. Said court denied to Petitioner such due process of law:

(1) By arbitrarily and unjustly penalizing her by its decision and judgment, for the acts of the attorney for Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state circuit court to construe the will in harmony with said contention,—acts for which Petitioner was not responsible in any way;

(2) By arbitrarily and unjustly penalizing Petitioner for the long delay caused chiefly by Respondent having neglected to sue out a writ of error within the time allowed by state statute, and also caused by said act of the attorney for Respondent's guardian, in making on her behalf the above mentioned affirmative defense; and

(3) By arbitrarily and unlawfully holding, contrary to the law and the undisputed facts, that said guardian ad litem for Mrs. Kennard, by his attorney, in making said affirmative defense, "went beyond any authority he had" and thereby "caused a decree to be entered which limited" her "rights"; and by thereupon treating said holdings as a basis for the instant decision for Mrs. Kennard and against Mrs. Wiggins.

Spotts v. Spotts, 331 Mo. 917 at 921, 924, 930-931, 932; 55 S. W. 2d 977 at 978, 980, 983-984.
Fiene v. Kirchoff, 176 Mo. 516 at 522, 526, 527; 75 S. W. 608 at 609-611.
McIntosh v. Wiggins, 123 F. 2d 316, at 321.

V. The raising of the federal question in the instant case was timely, although it did not occur until the case reached the state supreme court.

Missouri ex rel. Mo. Ins. Co. v. Gehner, 281 U. S. 313 at 319-320; 74 L. Ed. 870 at 875, 876.
Saunders v. Shaw, 244 U. S. 317 at 320; 61 L. Ed. 1163 at 1165, 1166.

Prayer.

For the purpose of correcting the errors complained of and to the end that the rights of Petitioner may be determined in accordance with law, your Petitioner respectfully prays: That a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Missouri, commanding it to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and proceedings of said state supreme court in the above-described cause, being Docket No. 37,396 on the docket of said court, to the end that the decision and judgment of said state supreme court in the above-entitled cause may be reviewed by this Honorable Court as provided by law; that said decision and judgment shall so be reviewed by this Court; that pursuant to the stipulation of the parties (R. 443-444) the Court permit the two copies of the Physical Exhibit (filed with the Clerk) to be treated for the purpose of this Petition as part of the transcript of record herein; and that your Petitioner may have such other and further relief as to this Court may seem appropriate.

ELLA L. WIGGINS,

By HARRY W. KROEGER,
DANIEL N. KIRBY,
Attorneys for Petitioner.

29

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IN THE

SUPREME COURT OF THE UNITED STATES.

October TERM, 1942

ELIZABETH LIGGETT KENNARD,
Respondent,
v.
ELLA L. WIGGINS,
Petitioner.

No. 224

BRIEF FOR PETITIONER, SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION 1.

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INDEX.

Page

Opinions below 1

Jurisdiction 2

Statement 3

The primary question presented..... 3

Specifications of error 4

Argument 6

Point I. The supreme court of Missouri (Division One) denied to Petitioner the due process of law guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motion that said Division One transfer the instant case to said entire court (composed of seven judges), which transfer was mandatory under the Constitution of Missouri, Article VI; Section 4 of Amendment of 1890, Rev. Stats. of Mo., Vol. I, page 127c, in cases when "a federal question is involved"..... 6

Point II. Even if there had been fraud in the will construction case, as alleged in the petition in the instant suit, Respondent had no right under Missouri law to a decree, because she neglected during the three-year period after she became twenty-one years old, to sue out of the state supreme court a writ of error to obtain a review of the state courts' decision in the will construction case (under Sections 1200 and 1202, Rev. Stats. Mo. 1939), issuable as "of course", being "a writ of right" 8

Point III. The state supreme court's decision that the pleadings and proof amply support the judgment below against Mrs. Wiggins is not sup-

ported by any substantial evidence, and, being wholly arbitrary, it unlawfully deprives Mrs. Wiggins of her property without due process of law, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States 13

Point IV. Said court denied to Petitioner such "due process of law";

(1) By arbitrarily and unjustly penalizing her by its instant decision and judgment, for the acts of the attorney for the Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state circuit court to construe the will in harmony with said affirmative contention,—acts for which Petitioner was not responsible in any way;

(2) By arbitrarily and unjustly penalizing her for the long delay that was caused chiefly by Respondent's having neglected to sue out a writ of error within the time allowed by statute and was also caused by the institution and prosecution of said futile litigation in the nunc pro tunc case, and in the two McIntosh suits in the federal courts; and

(3) By arbitrarily and unlawfully holding, contrary to the law and the undisputed evidence, that said guardian ad litem of Mrs. Kennard, by his attorney, in making said affirmative defense, "went beyond any authority he had" and thereby caused a decree to be entered which limited her "rights" and by thereupon treating said holdings as a basis for the instant decision against Mrs. Wiggins..... 26

Point V. The raising of the federal question was timely, although not raised until the case reached the state supreme court 32

Conclusion 35

Cases Cited.

Aden v. Dalton, 341 Mo. 454, at 467; 107 S. W. 2d 1070, at 1077 32
Anderson v. Biddle, 9 Mo. 580 (1845) 12
Cantwell v. Johnson, 236 Mo. 575, at 600, 601; 139 S. W. 365, at 374 ..... 9, 14
De La Vergne Ref. Mach. Co. v. Featherstone, 147 U. S. 209, at 222; 37 L. Ed. 138, at 142 35
Fiene v. Kirchoff, 176 Mo. 516, at 522, 526-527; 75 S. W. 608, at 609-611 28
First National Bank & Trust Co. v. Bowman, 322 Mo. 654, at 674; 15 S. W. 2d 842, at 852 17
Giozza v. Tiernan, 148 U. S. 657, at 662; 37 L. Ed. 599, at 601 12
Gorman v. Washington University, 62 Sup. Ct. Rep. 962, at 963 7
Harburg v. Arnold, 87 Mo. App. 326 12
Kennard v. Wiggins, 160 S. W. 2d 706, at 709 ..... 1, 2
Knox County v. Harshman, 133 U. S. 152, at 154; 33 L. Ed. 586, at 588 ..... 9, 10
McIntosh v. Wiggins, 123 F. 2d 316, at 319, 321, 321-322, 322; certiorari denied March 2, 1942, 62 S. Ct. 800; rehearing denied March 30, 1942, 62 S. Ct. 914 ..... 13, 18, 21, 25, 31
Marshall v. Holmes, 141 U. S. 589, at 596; 35 L. Ed. 870, at 873 10
Missouri ex rel. Mo. Ins. Co. v. Gehner, 281 U. S. 313, at 319-320; 74 L. Ed. 870, at 875, 876 34
Moore v. State of Missouri, 159 U. S. 673, at 680; 40 L. Ed. 301, at 304 8

Padgett v. Smith, 205 Mo. 122 12
Perkins v. St. L. K. C. & Col. R. R. Co., 143 Mo. 513, at 519; 45 S. W. 260, at 261 9
Saunders v. Shaw, 244 U. S. 317, at 320; 61 L. Ed. 1163, at 1165, 1166 34
Scott v. McNeal, 154 U. S. 34, at 45; 38 L. Ed. 896, at 901 ..... 8, 12
Spotts v. Spotts, 331 Mo. 917, at 921, 924, 930-931, 931, 932; 55 S. W. 2d 977, at 978, 980, 983, 983-984 ..... 9, 12, 28
U. S. v. Throckmorton, 98 U. S. 61, at 68; 25 L. Ed. 93, at 96 14
Wiggins v. Perry, 119 S. W. 2d 839, at 844 25
Wiggins v. Perry, 271 S. W. 815, at 819, 821, 826 ..... 17, 22

Statutes Cited.

Section 1 of Amendment XIV to the Constitution of the United States 4, 6, 13, 26
Section 4, of Amendment of 1890, to Article VI of the Constitution of Missouri; Rev. Stats. of Mo., Vol. I, page 127c 4, 6
Section 237 (b) of the Judicial Code, as amended by the "Act of February 13, 1925", C. 229, § 1, 43 Stat. 937 (28 U. S. C. A., § 344) 2
Section 240 of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 8 (a, b, d), 43 Stat. 940 (28 U. S. C. A., § 350) 2
Section 563, Revised Statutes of Missouri, 1939 34
Section 1200, Revised Statutes of Missouri, 1939 ..... 4, 8
Section 1202, Revised Statutes of Missouri, 1939 ..... 4, 8
Section 3500, Revised Statutes of Missouri, 1939 34

Text Cited.

34 C. J., Section 782, p. 945 9

Rule of Court Cited.

Rule 38 of the Supreme Court of the United States ... 2

IN THE

SUPREME COURT OF THE UNITED STATES.

October TERM, 1942

ELIZABETH LIGGETT KENNARD,
Respondent,

v.

ELLA L. WIGGINS,
Petitioner.

No. .....

BRIEF FOR PETITIONER, SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, DIVISION 1.

OPINIONS BELOW. The circuit court, City of St. Louis, did not render an opinion, but on February 4, 1940, entered its decree embodying its findings therein, (R. 69-91). The general nature of said decree has been stated in the accompanying Petition for a writ to which reference is made.

The third and final (second modified) opinion of the supreme court of Missouri on the appeal of Petitioner from said decree, is reported as *Kennard v. Wiggins*, in

160 S. W. 2d 706. The points decided and judgment rendered are explained in the "Statement" portion of said Petition.

In the companion case, *McIntosh v. Wiggins*, the District Court of the United States handed down no opinion, but announced and filed its Findings of Fact and Conclusions of Law, with Directions for Judgment in favor of Mrs. Wiggins. The opinions (majority and minority) of the United States Circuit Court of Appeals, Eighth Circuit, on Mrs. McIntosh's appeal in said cause, are reported as *McIntosh v. Wiggins*, in 123 F. 2d 316.

JURISDICTION. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 1, 43 Stat. 937 (28 U. S. C. A., § 344); also under Section 240 of the Judicial Code, as amended by the "Act of February 13, 1925," C. 229, § 8 (a, b, d), 43 Stat. 940 (28 U. S. C. A., § 350), and under Rule 38 of this Court.

The final decision of said Supreme Court of Missouri, Division One, was rendered on February 26, 1942 (R. 392). A motion for rehearing, and a motion to transfer said cause to said Supreme Court of Missouri in banc, were duly filed by Mrs. Wiggins on March 7, 1942 (R. 405), and overruled by said Supreme Court of Missouri, Division One, on April 16, 1942 (R. 441).

The judgment of the Supreme Court of Missouri, Division One, was rendered July 25, 1941 (R. 243), coincident with the filing of its first opinion; said judgment was not changed by its two later (modified) opinions (decisions). Its three opinions (decisions) were rendered: July 25, 1941, (R. 243-254); December 16, 1941, (R. 351-363); and February 26, 1942, (R. 392-405),—respectively. Petitioner's motions for rehearing and to modify said original opinion are at R. 255-288; they were overruled on December 16,

1941, (R. 351). Her motions for rehearing and to transfer to the court in banc, as to the first modified opinion, are at R. 365-380; they were overruled on February 26, 1942, (R. 392-393). Her motions for rehearing and to transfer to the court in banc, as to the second modified (or final) opinion, are at R. 406-434; they were overruled on April 16, 1942, (R. 440-441).

STATEMENT. A "Statement of the case" was made in the accompanying Petition for a writ, to which, for brevity here, reference is made.

The primary question presented. In 1923, the circuit court of the City of St. Louis entered a decree (construing the Liggett will) which expressly vested in Mrs. Wiggins, as a life tenant, the trust income here in dispute. Upon appeal from said decree to the Supreme Court of Missouri, the particular paragraph of said decree (in dispute in the instant case) that vested such rights, was not presented for review by any party to the case, except to the extent that Mrs. Wiggins in claiming a fee simple title to her one-third of the trust property, made contentions completely hostile to the existence of any life estate. Upon said appeal, the Supreme Court of Missouri, Division One, did not specifically rule upon said disputed paragraph, but by its affirmance left said decree of the circuit court in full force and effect. In the instant case said disputed paragraph in said 1923 decree is sought to be avoided on behalf of Mrs. Kennard, upon the theory of fraud, accident or mistake committed by Mrs. Wiggins, and the circuit court in 1940, entered its decree avoiding said paragraph. Upon review of said decree in the instant case by the Supreme Court of Missouri, Division One, it found that no actionable fraud, accident or mistake had been committed by anyone, but affirmed the vacation of the disputed paragraph upon the theory that Mrs. Kennard's guardian ad litem had committed an un-

authorized act in the will construction suit,—in which act Mrs. Wiggins in no way participated. It is contended that said supreme court thereby attempted to deprive Mrs. Wiggins of income vested in her by the decree of 1923, for no wrong committed by her.

So the primary question here presented, is whether the divestiture of Mrs. Wiggins' rights under the prior decree, by a subsequent decree based upon no wrong committed by her, constitutes a taking of property without the due process of law guaranteed to her by Section 1 of Amendment XIV to the Constitution of the United States and thereby unlawfully deprived her of property decreed to be hers by said will construction decree.

Specifications of Error. 1. The Supreme Court of Missouri, Division One, erred in denying to Petitioner the due process of law guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motions that said Division One transfer the instant case to said entire court (in banc), as required by the Constitution of Missouri, Article VI; Section 4 of Amendment of 1890; R. S. Mo. 1939, Volume I, page 127c, in cases "when a federal question is involved."

2. Said state supreme court erred in denying Petitioner such due process of law, by failing to sustain her contention, supported by the established doctrine of said court and of this Court, that even if Petitioner had been guilty of the alleged fraud in said state courts, Respondent could not recover against Petitioner in this direct attack in equity to have the disputed paragraph of the will construction decree held void, because Respondent had completely neglected to avail herself of the prompt, available and adequate other remedy provided by the statutes of Missouri (Sections 1200 and 1202, R. S. Mo. 1939), by suing out a writ of error from said state supreme court within three years after she became twenty-one years old, by

which writ she could have obtained complete relief from the alleged consequences of such alleged fraud, by having the decree corrected if wrong, and if prejudicial to Respondent.

3. Said state supreme court erred in denying to Petitioner due process of law, by holding and adjudging that the pleadings and proofs in the instant case "amply support the judgment below", and accordingly by affirming the decree herein of the state circuit court in favor of Respondent and against Petitioner, although said decision was not supported by any substantial evidence as against Petitioner, and being wholly arbitrary as to her, unlawfully deprived her of her property without due process, in violation of the due process clause of the Amendments to the Constitution of the United States.

4. Said state supreme court erred in denying to Petitioner due process of law: (1) by arbitrarily and unjustly penalizing her by its decision and judgment, for the acts of the attorney for Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state court to construe the will in harmony with said contention—acts for which Petitioner was not responsible in any way; (2) by arbitrarily and unjustly penalizing Petitioner for the long delay caused chiefly by Respondent's having neglected to sue out a writ of error within the time allowed by state statute, and also caused by said act of the attorney for Respondent's guardian in making on her behalf the above-mentioned affirmative defense; and (3) by arbitrarily and unlawfully holding contrary to the law and the undisputed evidence, that said guardian ad litem of Mrs. Kennard, by his attorney, in making said affirmative defense "went beyond any authority he had" and thereby "caused a decree to be entered which limited" her "rights," and by thereupon treating said holdings as a basis for the instant decision against Mrs. Wiggins.

ARGUMENT.

Point I. The Supreme Court of Missouri (Division One) denied to Petitioner the due process of law guaranteed to her by Article XIV, Section 1, of the Amendments to the Constitution of the United States, by denying her motion that said Division One transfer the instant case to said entire court (composed of seven judges), which transfer was mandatory under the Constitution of Missouri, Article VI; Section 4 of Amendment of 1890; Rev. Stats. of Mo., Vol. I, page 127c, in cases when "a federal question is involved."

Said state constitutional provision (copied in said Petition), made it mandatory on said Division One, and thereby gave Petitioner the right as of course and as a fixed part of state procedure and of "the law of the land," to have said entire court hear and decide the appeal in the instant case because a federal question was involved and presented by said motion (R. 377-379, 380).

That said motion to transfer was timely, is shown later herein.

By denying said motion, Division One deprived Petitioner of the opportunity to brief and argue the instant case *de novo* before the seven judges of the court in banc. That this opportunity had legal substance and public importance is demonstrated by the existence in the state constitution of a provision granting it as a matter of "right" rather than of judicial discretion. That the opportunity had actual substance is shown, we submit, by the record fact that Division One was so uncertain of the factual and legal grounds of its decision, that the court found it necessary to render three different opinions before it reached its final grounds. In the two modified opinions, the court made changes in at least two of the substantial provisions or grounds of its original opinion. Although, as of record, said modifications were made of the court's "own motion", in fact they were made coincident with the over-

ruling of motions for rehearing which had challenged said portions of its earlier opinions.

In denying Petitioner's motion to transfer, the court announced no reasons for said denial.

In *Gorman v. Washington University*, 62 Sup. Ct. Rep. 962, at 963, this Court recently decided that:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari, *until the possibilities afforded by state procedure for its decision by all state tribunals had been exhausted.*" (Citing cases.)

In the same case this Court decided, in dismissing a petition for a writ of certiorari to review a decision of Division One of the Supreme Court of Missouri, that for the purpose of considering such a petition, the Court could not under the Judiciary Act, recognize a decision of a division of the supreme court of Missouri as constituting the decision of the highest court of Missouri, because such decision "could be set aside by the court sitting en banc"; (62 Sup. Ct. Rep. at 963).

While above case differs from the instant one in that no motion to transfer was made by Gorman, whereas in the instant case motions to transfer were made by Mrs. Wiggins and denied, the decision is relevant to show that the denial by said Division One, of Petitioner's motions to transfer would operate, if said denial were held to be conclusive on this Court, to bar Petitioner from the further right, this time granted under the Federal Constitution, to have this Court consider and decide under its writ of certiorari, whether a federal question is involved in the instant case.

It is settled that upon a writ of error to review the judgment of the highest court of the state upon the ground

that it was against a right claimed under the Constitution of the United States, this Court is not bound by the state's construction of a state statute, but must decide for itself its true meaning in order to decide the federal question; *Scott v. McNeal,* 154 U. S. 34, at 45; 38 L. Ed. 896, at 901.

For the above reasons, supplemented by the fact that they seem distinguishable upon the facts, it is submitted that the case of *Moore v. State of Missouri,* 159 U. S. 673, at 680; 40 L. Ed. 301, at 304, and later cases following it, are not in point.

Point II. Even if there had been fraud in the will construction case, as alleged in the petition in the instant suit, Respondent had no right under Missouri law to a decree, because she neglected during the three-year period after she became twenty-one years old, to sue out of the state supreme court a writ of error to obtain a review of the state courts' decision in the will construction case (under Sections 1200 and 1202, Rev. Stats. 1939,—copied in the accompanying Petition), issuable as "of course", being "a writ of right".

This was a prompt statutory remedy available to review the will construction decree, by which she could have caused said state court to promptly consider and decide all of the same contentions about the propriety of the disputed paragraph being or remaining in the will construction decree, that she seeks to make in the instant direct attack in order to have said paragraph decreed void. It was and is incumbent on her to show affirmatively that she "was free from fault or negligence" in not thus resorting to said other available and adequate remedy, or a valid excuse for not having done so, as a condition precedent to recovering in the instant direct attack on the will decree for alleged fraud in its inception and affirmance, if such fraud had existed. She made no effort to excuse her said neglect.

The above statutory right of review by writ of error sued out *within three years* was granted to litigants (like Respondent) who were *under twenty-one* and therefore could not litigate for themselves, and who, when sued, were compelled to defend by guardians at litem represented by counsel selected by the latter; *the period of three years* was allowed so that with the aid of counsel of such defendant's own and adult selection, judgments affecting them could be reviewed upon any ground appearing upon the face of the record before the state supreme court; *Spotts v. Spotts*, 331 Mo. 917, at 931 (55 S. W. 2d 977, at 983). All of the facts held in the instant case to support the decision of the state supreme court, were open upon the record and papers before it on the appeal from the will construction decree.

It is the general doctrine established by the courts in most jurisdictions, including this Court and the Supreme Court of Missouri, that:

> "To justify a court of equity in enjoining the enforcement of a judgment, *the complainant's case*—including alike the specific grounds on which he asks equitable relief, *his excuse for not making his defense in the original action, and the showing that he himself is free from fault or negligence*—must be supported by clear, satisfactory and convincing evidence, preponderating distinctly in his favor"; 34 C. J., p. 495, Sec. 782.

> "Where fraud, accident, surprise or mistake is a ground for equitable relief against a judgment, plaintiff must come into court with a cause *unmixed with his own negligence* or fault"; *Cantwell v. Johnson*, 236 Mo. 575, at 600; 139 S. W. 365, at 374.

See also *Perkins v. St. L., K. C. & Col. R. R. Co.*, 143 Mo. 513, at 519; 45 S. W. 260, at 261.

In this Court the same doctrine was stated thus, in *Knox*

County v. Harshman, 133 U. S. 152, at 154; 33 L. Ed. 586, at 588:

> "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing of by fraud or accident, *unmixed with negligence of himself or his agents.*"

See also: *Marshall v. Holmes*, 141 U. S. 589, at 596; 35 L. Ed. 870, at 873.

Mrs. Kennard attained the age of twenty-one on March 10, 1928, (Phys. Ex. *577). Her contention by her present counsel, that the disputed paragraph of the will decree was wrong in its interpretation of the will and was prejudicial to her, began at least as early as the fall of 1928, and has continued ever since. The will decree became final on April 13, 1925, (R. 180), when the state supreme court denied the daughters' motion for rehearing following the affirmance of the decree. Mrs. Kennard had three years after March 10, 1928,—until March 10, 1931,—in which to sue out a writ of error. Her counsel, also representing Mrs. McIntosh, filed the latter's first federal suit against Mrs. Wiggins on June 19, 1929.

If Mrs. Kennard had sued out a writ of error in the will construction suit, the state supreme court would have reviewed and corrected all actual errors called to its attention and made by the circuit court in the will construction decree, including an alleged erroneous interpretation of the will if it had been erroneous. Said supreme court would also, if so requested, have considered and decided whether the attorney for Mrs. Kennard's guardian ad litem had exceeded his authority in the will construction suit by filing the answer and trial brief that said court held in the instant case to have been beyond his authority; and whether or not she was bound by said answer and

brief. Said supreme court would also, if so requested, have considered and decided whether any statements made in the briefs of counsel on the appeal from the will construction decree had misled or deceived said court into affirming said decree, and if that had occurred the court would promptly have corrected any error that it found in the decree, prejudicial to Mrs. Kennard.

This quickly available remedy was a complete and adequate remedy provided by statute to protect Mrs. Kennard's rights as an infant defendant against any errors committed, or injustice done, by the will construction decree or in the will construction suit, and it was the only such remedy provided by statute. That her present counsel knew at least as early as November 25, 1930, of the statements and briefs filed in said state supreme court in the will construction suit, [from which briefs certain statements of counsel, including one statement of counsel for the daughters, were quoted in, and made (in part) the basis of, the instant decision against Mrs. Wiggins], is shown in the stipulation signed by said counsel for Mrs. Kennard (Phys. Ex. *524, 525). By neglecting said available and adequate remedy by writ of error, with knowledge of the facts upon which (in part) the instant decision is based, she *voluntarily closed against herself the right of access to equity in this direct attack on the decree to get such relief.*

Instead of availing of this statutory remedy within said three-year period, she allowed the entire time to pass without acting, until she filed the instant suit in the state court and Mrs. McIntosh filed her companion suit in the federal district court, both on March 21, 1931, just ten days after the end of said three-year period.

The contention here made was urged upon the state supreme court: in Mrs. Wiggins' motion to modify the first opinion in the instant case, (R. 285-286); in her motion for rehearing as to the second opinion, (R. 369-370); in her

motion to transfer, by reference to said motion for rehearing, (R. 380); in her motion for rehearing as to the third opinion (R. 420-423); and in her motion to transfer, by reference to said motion for rehearing, (R. 434).

Said supreme court did not rule expressly upon said contention and it is submitted that *by failing to sustain it and by denying said motions, the action of the court was arbitrary and a denial of due process.*

The following cases cited by Mrs. Kennard (R. 304) in opposition to the existence of said remedy by writ of error, as not available "to a decree in equity", nor when the judgment in question was affirmed on appeal, are not in point.

In *Anderson v. Biddle,* 9 Mo. 580 (1845), the complete opinion reads:

> "On motion it was held, that a writ of error will not lie to a decree in chancery."

Whatever the law may have been in 1845, it is no longer in effect, as shown by the above citation to *Spotts v. Spotts,* 331 Mo. 917, at 931; 55 S. W. 2d 977, at 983.

The other two cases cited for Mrs. Kennard,—*Padgett v. Smith,* 205 Mo. 122, and *Harburg v. Arnold,* 87 Mo. App. 326,—merely hold that when an adult litigant has appealed from an adverse judgment and such judgment has been affirmed for any reason, he has exhausted his full right to a review by an appellate court.

That arbitrary action by the highest court of a state, prejudicial to a litigant, constitutes a denial of due process, is established law.

Scott v. McNeal, 154 U. S. 34 at 45; 38 L. Ed. 896 at 901.

Giozza v. Tiernan, 148 U. S. 657 at 662; 37 L. Ed. 599 at 601.

Point III. The state supreme court's decision that the pleadings and proof amply support the judgment below against Mrs. Wiggins is not supported by any substantial evidence, and, being wholly arbitrary, it unlawfully deprives Mrs. Wiggins of her property without due process of law, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States.

In the companion case, *McIntosh v. Wiggins*, 123 F. 2d 316, at 321, the Circuit Court of Appeals held that the finding of the District Court in said case, "That there was no fraud, accident or mistake with respect to the insertion in the decree of the Circuit Court of the City of St. Louis," of the disputed paragraph in the will construction case, was "not erroneous."

The final opinion in the instant case does not contain even a suggestion that any actionable "fraud, accident or mistake" for which Mrs. Wiggins or her counsel were responsible, induced the insertion of the disputed paragraph into the will construction decree in the circuit court. On the contrary, the finding here is (R. 402-403, 404) that it was "*The action of the guardian ad litem, by his attorney* in going beyond any authority he had" that "*Caused a decree to be entered which limited* the *rights of his ward.*" Nor does said opinion contain any suggestion that actionable *accident* or *mistake*, caused or contributed to by Mrs. Wiggins, constitutes the basis of the instant decision against her. It was the mistake, not of Mrs. Wiggins, but of counsel for Mrs. Kennard's guardian ad litem (a mistake of law, not of fact), that the opinion found had caused such decree to be entered; and because of this mistake the opinion said that "to refuse redress in the present case 'would be a reproach to the administration of justice'" (R. 404).

Since none of the foregoing acts were done or caused by Mrs. Wiggins, the final decision for Mrs. Kennard in the

instant case is wholly arbitrary as to Mrs. Wiggins because the opinion lacks findings supported by substantial, clear and convincing evidence that prove Mrs. Wiggins or her counsel to have been guilty of *actual and extrinsic fraud* causing prejudice to Mrs. Kennard. The charge of the petition is without evidence to sustain it.

The law upon this point is firmly established in the jurisprudence of Missouri and of this Court. The opinion in the instant case does not purport to change it in Missouri.

In *U. S. v. Throckmorton*, 98 U. S. 61, at 68, 25 L. Ed. 93, at 96 (a leading case), this Court announced as the rule that:

> "The acts for which a court of equity will *on account of fraud* set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to *frauds, extrinsic or collateral, to the matter tried by the first court,* and *not to a fraud in the matter on which the decree was rendered.*"

In *Cantwell v. Johnson*, 236 Mo. 575, at 601; 139 S. W. 365, at 374, the Missouri doctrine was stated thus:

> "Fraud entitling him to relief must be fraud *arising on extrinsic matter* whereby he or the court was tricked, and the court was made an instrument of injustice. So, when he claims it to be against conscience to execute a judgment, *the injured party must clearly prove either that he could not have availed himself of his defense* in a court of law, or that he might have availed himself of it but *was prevented by fraud* or accident *unmixed with his own fault or negligence.* * * * Judgments are impeachable only *for fraud 'extrinsic to the merits of the case'.* 'They are not impeachable for fraud relating to the merits between the parties.' *All such 'mistakes and errors must be corrected from within by a motion for a new trial, or*

> *to reopen the judgment, or by appeal.'* The foregoing propositions announce settled doctrine." (Citing Missouri decisions.)

The obvious philosophy of above doctrine is that when the alleged fraud was "intrinsic",—occurred *within* the trial or *hearing on appeal,* of the case in which the attacked judgment was rendered,—the injured party can and must correct it by some other remedy than a direct attack in equity *if such other remedy is available and adequate.* A conscious neglect to do so bars relief in equity by a separate suit directly attacking the judgment.

Turning now, with above doctrine in mind, to the final opinion in the instant case, it is significant to note that while the factual and legal bases for the decision against Mrs. Wiggins are not at all clear, the only findings upon which the decision against her seems to rest, are:

(1) That in the appeal brief of her counsel, in the will construction suit, there was the statement quoted in said opinion (R. 401) that:

> *"In case a daughter should die during the trust period,* then *the remainder* of the said subject matter with which the testator was here dealing—the *equitable estate during the rest of the trust*—should go over to the heirs of the body of the deceased daughter, and in default of such heirs, then to the survivors of the daughters, again with remainders over to the heirs of their *bodies."* (Emphasis as in said brief; Phys. Ex. *362.)

For the making of the other statements quoted in said opinion from the briefs of counsel for other parties, Mrs. Wiggins is not responsible.

(2) That concerning the averments in the petition in the instant case, that "on appeal in the will construction suit counsel *did not advise* this court as to the disputed

paragraph in the decree", (R. 404), and concerning the contention that said paragraph *"was, in effect, concealed from this court* on the appeal in that case", (R. 399), the opinion said:

> "It is true that the disputed paragraph was in the will construction suit decree, and that this court *affirmed* that decree, but it is quite apparent, if not conceded, that this court's attention was *not directed* to the disputed construction, * * *", (R. 398-399, emphasis by the court); also,
>
> "Whether concealed or not, it was given but scant attention, and there *were statements in the briefs, in effect, contrary to the construction in the alleged paragraph;"* (R. 399).

(3) That "No Judge, by reading the briefs in the will construction appeal, *would even suspect such a construction as that contained in the challenged paragraph of the decree"*; (R. 401).

It is submitted that said findings or statements lack substantial evidence to support them and are inadequate in law to sustain the decision *against Mrs. Wiggins,*—for the following reasons in each instance:

(1) In quoting as above, the statement from the appeal brief of the daughters, said state supreme court inadvertently omitted the next sentence in the same paragraph, which materially alters the meaning apparently attributed to said quoted part, by said opinion. Said omitted sentence reads:

> *"And in case the daughters should survive, then they themselves would take as 'beneficiaries' under the distribution paragraph No. 13."* (Phys. Ex. *362.)

The first sentence in said paragraph dealt only with the disposal of the equitable estate of a daughter who

might die "during the trust". But no such factual situation was then before the state supreme court, because the trust had ended in 1916, and all the daughters had survived the trust period. Therefore, the second above sentence was the one that applied to the then facts, and in it the daughters merely stated their contention that they were entitled at the end of the trust period, to receive their portions of the trust estate under the distribution clause of the will *in fee simple titles*, just as the grandson had taken his portion under said clause as applied in the accounting decree. No judge reading said entire paragraph, could possibly have been deceived into thinking that the daughters were making any contention except *said single contention*, asserted in their petition (Phys. Ex. *197), recognized as such in the briefs of opposing counsel (Phys. Ex. *289), and in the opinion of the court affirming the will decree (*Wiggins v. Perry*, 271 S. W. 815 at 821). Nor can the paragraph be considered as having concealed from the court the only contention that the daughters were making about the kind of titles they were entitled under the will to have the trustees convey to them by distributive conveyances.

Mrs. Wiggins owed no duty to her adversaries or to the court, to disclose matters which might defeat the daughters' contention as to title (*First National Bank & Trust Co. v. Bowman*, 322 Mo. 654, at 674; 15 S. W. 2d 842, at 852), where the court cited as the general rule (from 34 C. J. 283):

> "*Mere failure to disclose* to the adversary, or *to the court, matters which would defeat one's own claim or defense* is *not such extrinsic fraud as will justify or require vacation of the judgment.* Actual fraud as distinguished from constructive fraud is essential."

Therefore Mrs. Wiggins owed no duty to call to the court's attention, the existence in the decree, of the con-

tention shown by the pleadings and other parts of the record to have been made on behalf of Mrs. Kennard, since that contention was entirely hostile to the contention being made by the daughters.

Pertinent to this point, the Circuit Court of Appeals in *McIntosh v. Wiggins*, 123 F. 2d 316, at 322, held and said:

> "Ella L. Wiggins cannot be charged with doing anything toward procuring the construction of the will which the circuit court of the City of St. Louis adopted when it entered its decree. *She was a losing, and not a successful party, in that litigation.*"

The Circuit Court of Appeals in its said opinion also quoted from the opinion of the Supreme Court of Missouri (271 S. W., at 826), one of the same statements quoted in the instant opinion (R. 400), from the brief of counsel for Mrs. Kennard, beginning with the words "We therefore respectfully submit",—and concerning said statement the Circuit Court of Appeals held and said (123 F. 2d 316, at 321):

> "The theory that *counsel for the minor grandchildren* of Dolly L. Kilpatrick * * * *imposed upon the Supreme Court of Missouri* in the appeal from that decree *by not calling specific attention* to *that provision* and by *making statements in his brief which might be taken to indicate that no such provision was in the decree, is not tenable.*"

This ruling applies with equal if not greater weight, to the above quoted statement from the brief of counsel for Mrs. Wiggins.

(2) The above quoted statements in the final opinion of the state supreme court in the instant case, that "On appeal in the will construction suit counsel *did not advise this court as to the disputed paragraph in the decree,*" and that said paragraph "*was, in effect, concealed from this*

court upon the appeal in that case," and that *"this court's attention was not directed to the disputed construction,"* not only lack the support of substantial evidence, but are completely contrary to the undisputed facts of record on said appeal, which show:

(a) The Abstract of Record, on the daughters' appeal from the will construction decree, contained a complete copy of the decree (Phys. Ex. *223-227);

(b) Said Abstract also contained a copy of the daughters' petition (Phys. Ex. *168-202), showing the issues presented by the daughters, and that "contingent" interests were to be adjudicated (Phys. Ex. *185);

(c) Said Abstract also contained: A complete copy of the answer filed for the guardian of Mrs. Kennard, contending on her behalf that the daughters took life estates only and that her prospective remainder would not vest until the death of the last daughter to survive; and that said answer had prayed that the Court *"so construe the will"* (Phys. Ex. *213-214); said Abstract also showed that the reply of the daughters denied the new matter in said answer — in complete hostility to the existence of any remainders (Phys. Ex. *222), thus making said contention concerning the meaning of the disputed paragraph in the will *an issue* in the case as between the daughters on the one hand and Mrs. Kennard on the other hand.

(d) The main brief for the daughters (appellants in the will construction suit) definitely informed the court: That *"the nature of the title that passed to the daughters"* was for decision, *their only contention being that they took fees, not merely life estates* (Phys. Ex. *329); that *"the only parties having substantial conflicting interests* are *the daughters of testator* on the one hand and *their own descendants* on the other hand, except that *in*

the case of Mrs. Cora B. Fowler, who has no descendants, the interests opposing her are the minor descendants of her sisters'' (Phys. Ex. *330); that the answers filed on behalf of minor descendants of Mrs. Fowler's sisters contended, in substance (Phys. Ex. *337), that the daughters took life estates only, and that the share of a daughter who might die without issue would go to the surviving daughters, in equal portions, for life, but that the remainder *would not vest until the death of the last survivor of the daughters,* and that thereupon it would pass to "the surviving issue of said daughters, share and share alike, per stirpes" (which necessarily meant that the phrase "heirs of the body" was not construed in its technical sense), and that said answers prayed the court to adjudge and determine and to construe said will (Phys. Ex. *337). The brief for the daughters also contained a copy of the paragraph of the will that disposed of the share of the grandson, John, in case he died without issue before attaining the age of thirty, by providing (Phys. Ex. *367-368) that: *"The last of my said daughters being dead, the whole of John E. Liggett, Jr.'s share* (he being dead before he arrives at the age of thirty years without issue) shall go to and become the property of the issue of such of my daughters as shall die leaving issue, to take per stirpes, * * *."

(e) The brief for Mrs. Kennard's guardian ad litem, in the will construction appeal, closed with the contention that the *"interpretation placed upon the will by the learned trial judge is strictly in accord with its true purpose and intent,"* and that *"if so, the judgment is right and should be affirmed by this Court"* (Phys. Ex. *316).

The brief for the grandson and members of his family, including his minor children (defendants), also contended that *the decree "was correct and should be affirmed"* (Phys. Ex. *435).

These contentions show that earlier statements in the same briefs, referring to the "heirs of the body" of a deceased daughter, *could not have used said phrase in the technical sense contended for herein by Mrs. Kennard.* This is so also as to the use of said phrase in other parts of the briefs. Counsel were not contending about the meaning of the will concerning the disposal of the share of a daughter who might die without issue, leaving both her sisters surviving her. In fact, it is conceded that no counsel in the case made any contention in the appeal from the will construction decree concerning that question, and said supreme court as then constituted did not have before it any arguments *pro* or *con*, on said question.

As the Circuit Court of Appeals held and said (*McIntosh v. Wiggins*, 123 F. 2d 316, at 319):

> "The questions *as to what would become of the share of a daughter having a life estate, in the event she died without issue,* and *as to when the share of such a daughter would vest in remainder* were *not in dispute, were not raised,* and, *of course, were not before the Supreme Court of Missouri on the appeal.*"

There is no evidence in the instant case that the state supreme court, as constituted in 1925, did not read the entire will construction decree; nor that it did not read said printed Abstract of Record then before it on the appeal from said decree; nor that it did not read the appellants' main brief filed therein on behalf of the daughters.

Judge Woodson, who wrote the opinion of said court affirming the will construction decree (handed down March 16, 1925), has been dead for many years. The entire personnel of Division One of said court has changed since that time. It is impossible to ascertain from living witnesses whether Judge Woodson did or did not read the above-mentioned portions of the Abstract, or whether he

did or did not read the above-mentioned portions of the brief for the daughters.

However, there is a strong presumption *(conclusive in the absence of such proof)* that the court did its duty by reading the above portions of each of those pamphlets, particularly the main brief for the appellants.

There is also *conclusive proof* that Judge Woodson *did* read said brief for the daughters, because he made extensive copies from it in said opinion affirming the will decree. A comparison of the "Statement" contained in said opinion with the "Statement" in said brief shows that most of the court's said "Statement" was copied almost verbatim from the daughters' brief, omitting paragraph captions.

Among the portions so copied was the following, of special interest here, (*Wiggins v. Perry*, 271 S. W., at 819):

> "So that, in this suit to construe the will, *the only parties having substantial conflicting interests* are *the daughters of testator* on *the one hand*, and *their own descendants* on *the other hand, except* that *in the case of Mrs. Cora B. Fowler, who has no descendants, the interests opposing her are the minor descendants of her sisters*"; (copied from the brief of the daughters, Phys. Ex. *330).

From the foregoing cumulative evidence contained in said abstract, in the brief of the daughters, and in said opinion of the court, it is indisputable that said court *was adequately informed:* that the meaning of the disputed paragraph of the will had been an issue in the circuit court; that minor defendants were interested in the determination of said issue; and that a determination of said issue in harmony with the contention made on behalf of the minor defendants, would necessarily attribute to the words "heirs of the body" the meaning thus contended

for, and would not attribute to them the technical meaning contended for by Mrs. Kennard and held by the court in the instant case to have resulted from the mandate of statutes which had no relation whatever to wills of personal property.

(3) No judge of said state supreme court, zealous as are the present members of said court, to protect the interests of minor defendants (wards of the court in chancery), having the case for decision *de novo,* and having the information above stated, would have refrained from searching the will construction decree to see what meaning it gave to the paragraph of the will thus in dispute below as between the said contention made for the minor defendants, and the opposing contention made for the daughters.

Every such judge by merely reading the main brief of the daughters, would have learned the nature of this disputed contention, and would at once, without the slightest difficulty, have found the disputed paragraph of the decree staring him in the face at three separate and prominent places in the complete copy of the decree set out in the printed Abstract of Record; (Phys. Ex. *265; *268; and *271). Said provisions followed closely after a general adjudication and decree:

> "That the daughters of said testator *take under said will life estates only,* with contingent remainders over as hereinafter specifically set forth"; (Phys. Ex. *263).

In view of the foregoing undisputed record evidence, it cannot be said that the attention of the state supreme court "was *not directed*" to said disputed issue. Nor can it be said that: "No judge by reading" the brief for the daughters "would even suspect" the presence in the decree of said disputed paragraph. We do not doubt that

Judge Woodson did examine said abstract and did carefully read the main brief for the daughters on the appeal from the will decree. Having done so, the conclusion is unavoidable that he read said disputed paragraph, and that if he had considered the interpretation of the will therein expressed to have been erroneous, he would have caused the disputed paragraph of the decree to be modified. The fact that he did not, argues persuasively that Judge Woodson and his associates on said bench thought the construction right. The trial judge (Hon. Franklin Miller), regarded by counsel as "One of the ablest judges on our circuit bench" (Phys. Ex. *316), thought it was right because he examined the draft of decree, signed it, and caused it to be entered of record (R. 136). He had practiced law for eighteen years before becoming a judge (R. 135).

It should be noted that there is no evidence in the record of the instant suit tending to prove that Judge Woodson did not know the above facts contained in said record and pamphlets on said appeal. Nor is there any direct evidence that either he or his associate judges *were in fact deceived or misled* by the quoted statements from the briefs of counsel on the appeal from the will construction decree. The decree of the state circuit court in the instant case did not make any specific finding that the affirmance of the will decree had in fact been induced by any fraud upon the state supreme court. Nor did said supreme court expressly find or hold in its instant decision that said statements contained in, or omitted from, the briefs of counsel *did in fact* mislead the court into affirming, or refraining from modifying, the will decree with the disputed paragraph in it.

And since said court in its opinion on the appeal in the nunc pro tunc case stated that in the will construction appeal it had not been "attempting to specifically rule" on

the disputed paragraph of the decree (*Wiggins v. Perry*, 119 S. W. 2d 839, at 844), it is evident that said court must have thought the decree correct, and therefore made no specific ruling upon the disputed issue, but left the paragraph undisturbed by entering a general affirmance. The daughters as defeated litigants and appellants in the will construction suit, did their full duty to inform the state supreme court concerning the pleadings and issues in the case, to the extent shown by the portions of the abstract and daughters' brief above mentioned.

In any event, it is clear that the state supreme court predicated its decision in the instant case against Mrs. Wiggins upon a mere assumption and surmise (without substantial evidence to support it and contrary to the undisputed evidence), that said court was in fact deceived or misled by said statement quoted from the brief for the daughters, into affirming, rather than reversing or modifying, the disputed paragraph of the will decree. There is no law, either state or federal, that supports or sanctions a direct attack upon a judgment, based upon mere surmise or assumption, as distinguished from clear, positive and convincing evidence that the court was in fact misled or deceived into entering or affirming the judgment.

We quote again from the opinion of the United States Circuit Court of Appeals (123 F. 2d 316, at 321-322):

> "So far as the charge that the Supreme Court of Missouri was imposed upon is concerned, *it is enough to say that the challenged provision of the decree was not questioned in that court by any of the parties to the appeal and was not an issue on appeal.* If that court had wished to make an independent investigation of the correctness of each provision of the decree, it could have done so *on the record before it, which contained all essential data. We are satisfied that there is no factual basis to support a conclusion that the*

challenged provision of the decree of the Circuit Court of the City of St. Louis resulted from fraud or from any accident or mistake that would permit a court of equity to relieve the appellant from the effect of the provision complained of.''

Since the findings upon which the instant opinion based its decision against Mrs. Wiggins are without evidence to support them, and are contrary to the indisputable written evidence of record, and are clearly inadequate in law to support the decision evidenced by said modified opinion herein, we respectfully submit the decision is wholly arbitrary as to her, and Petitioner therefore was unlawfully deprived of her property without due process of law, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States.

Point IV. Said court denied to Petitioner such ''due process of law'':

(1) *By arbitrarily and unjustly penalizing her by its instant decision and judgment, for the acts of the attorney for the Respondent's guardian ad litem, in making an affirmative contention and defense on her behalf and in asking the state circuit court to construe the will in harmony with said affirmative contention,—acts for which Petitioner was not responsible in any way;*

(2) *By arbitrarily and unjustly penalizing her for the long delay that was caused chiefly by Respondent's having neglected to sue out a writ of error within the time allowed by statute and was also caused by the institution and prosecution of said futile litigation in the nunc pro tunc case, and in the two McIntosh suits in the federal courts;* and

(3) *By arbitrarily and unlawfully holding, contrary to the law and the undisputed evidence, that said guardian ad litem of Mrs. Kennard, by his attorney, in making*

said affirmative defense, "went beyond any authority he had" and *thereby caused a decree to be entered which limited her "rights"* (R. 404) *and by thereupon treating said holdings as a basis for the instant decision against Mrs. Wiggins.*

Upon reading the three opinions herein of the state supreme court, the conclusion seems probable that because said court's first impression was that an infant defendant had been defrauded by the will decree—the court determined, quite properly, to search the record for a basis on which it could validly grant relief, although its jurisdiction to do so was limited by the petition to a decision that actionable fraud, accident or mistake, *caused by Mrs. Wiggins*, had *resulted in the alleged prejudice to Mrs. Kennard.*

Under the challenges of motions filed for Mrs. Wiggins and of "Suggestions" of the *amicus curiae*, but "of its own motion," the court apparently abandoned the ground of actual fraud, and turned in its first modified opinion, to "constructive fraud," as the basis of its decision; at the same time it greatly enlarged its ruling as to the scope of the authority of the guardian ad litem of a minor defendant, beyond the strict confines indicated in its original opinion.

Again challenged,—that constructive fraud, even if proved, is not a valid ground for setting aside a judgment,—the court deleted that finding and based its final decision on the stated grounds: that "the challenged paragraph in the will construction suit, under the facts, *wrongfully deprived* a minor defendant * * * of the possession of the property and income therefrom * * *," (R. 404-405); and "that the action of the guardian ad litem, by his attorney, in going beyond any authority he had, *caused a decree to be entered* which limited the rights of his ward," (R. 404).

It should be noted that in reaching the latter conclusion, the court neither distinguished nor overruled its own decisions in *Spotts v. Spotts,* 331 Mo. 917, at 921, 924, 930-931, 932; 55 S. W. (2d) 977, at 978, 980, 983-984, and in *Fiene v. Kirchoff,* 176 Mo. 516, at 522, 526-527; 75 S. W. 608, at 609-611,—in each of which cases guardians at litem for minor defendants had made affirmative contentions about the construction of conveyances affecting property in which their wards had interests,—and their conduct in doing so was judicially sustained, *treated as valid without any challenge of their power to make such defenses;* (see Petitioner's "Motion to Modify", R. 277-280). This abrupt departure from the established doctrine and practice of the court was arbitrary.

In its final opinion the court stated concerning the power of a guardian ad litem for an infant defendant in a will construction suit, that "it is entirely proper * * * to contend for any reasonable construction favorable to his ward, and where there are two possible constructions, it would be his duty to contend for the one most favorable to his ward"; also "a guardian ad litem for a minor defendant is more than a mere figurehead, and the office is not merely perfunctory, and his duties are not shadowy"; he *"should do for his ward 'what with riper judgment he would do for himself' ";* (R. 402). Also: "Clearly, the duty of the guardian ad litem was to contend for the reasonable construction *most beneficial to his ward under all the circumstances,* and *he had no authority to do otherwise";* (R. 403).

The performance of the above sanctioned duties of a guardian ad litem clearly contemplate the exercise of a reasonable discretion and he is within his recognized powers if he does for his ward "what with riper judgment he would do for himself". This is precisely what the guardian ad litem for Mrs. Kennard, acting through his

attorney, did on her behalf; see his "suggestions" (R. 289-292; 382-384). His complete good faith in acting as he did is not challenged, but is expressly recognized in the opinion; (R. 404-405). He was an able and experienced lawyer, recognized by the opinion to have had a "long and honorable career". That he had made a careful study of facts and law in the case, is demonstrated by the fact that the state supreme court in deciding the only contention made for the daughters in the will construction case, made copious quotations from his brief, and adopted his language in the reasons assigned by the court for the decision defeating the daughters' claim to fee titles. In drafting the form for decree he had to comply with the prayer in the daughters' petition that if the court should hold them entitled to mere life estates, they be judicially instructed concerning "the nature, extent, conditions and limitations of the estate vested" in them; (R. 290-291; Phys. Ex. *201). The trial court having adopted said attorney's contention that the daughters took life estates only, and not having instructed him further concerning the court's view of nature and extent of such life estates, he assumed (quite properly) that the court had also adopted his contention on that issue made by the pleadings. That he entertained in good faith this view of the intent of the will, is evidenced by the fact that he had expressed it in his said answers and in his trial brief, long before the trial court had announced its conclusion on the issue of fee titles versus life estates. Under commission by the court, he had to construe the will as to the nature and extent of the life estates, that is, whether, upon the death of a daughter without issue leaving both her sisters surviving her, the life estates would be successive, and therefore whether the last life estate would end only at the death of the last daughter to survive, or whether some other interpretation should be stated (R. 291). His professional integrity and duty to the court compelled him to insert into the form of a

decree the meaning on this point that he sincerely believed was the correct intent of the will. So he did exactly what the court in its instant opinion described as within his lawful authority, by exercising on behalf of the ward the same judgment, and by doing for her what with riper judgment he would have used and done for himself.

All the daughters were living and married. Both Mrs. Kilpatrick and Mrs. Wiggins had a child or children, but Mrs. Fowler had none. Under these circumstances he drew the disputed paragraph in accord with his professional opinion (stated in his answer and brief) concerning the expressed intent of the will and also giving exactly the same contingent benefits to Mrs. Kilpatrick and to Mrs. Wiggins in the Fowler portion in case they should survive her and she should leave no issue. If Mrs. Wiggins had predeceased Mrs. Kilpatrick the latter would during the rest of her life have received under the disputed paragraph the income of the same portion of the Fowler portion here in dispute and to which the federal courts have twice held Mrs. Wiggins entitled.

In its opinion in the first McIntosh case, the federal district court said (Phys. Ex. *530):

> "At the time the state court suit was pending, *it could not have been known* that Mrs. Fowler would be the first of the three daughters of the testator to depart this life; nor could it then be known that plaintiff's mother, Mrs. Kilpatrick, would be the next to die. If Mrs. Wiggins, defendant here, had predeceased *Mrs. Kilpatrick, the latter,* under the decree of the state courts, *would, under defendant's present contention, then have taken the identical life estate, now here claimed by the defendant.*"

Since obviously it could not have been known, the attorney for Mrs. Kennard's guardian, by his contention, gave to Mrs. Kilpatrick and Mrs. Wiggins *equal chances* to become the owner for the rest of her life of the same

portion of the trust income from the Fowler portion, here in dispute.

But the instant opinion holds in effect that said attorney should have had prophetic vision and should not have given any such chance to either of the sisters surviving Mrs. Fowler, but should have caused the will decree to provide, contrary to his own legal opinion and contrary to his understanding of what the trial judge intended, that the life estates of Mrs. Kilpatrick and Mrs. Wiggins, surviving Mrs. Fowler and in her trust portion, *would not be successive.* This was arbitrary treatment. The undisputed record facts failed to provide a substantial basis for a finding of fraud.

The Circuit Court of Appeals so held in the second McIntosh case (*McIntosh v. Wiggins*, 123 F. 2d 316 at 321), saying:

> "*There could have been no fraudulent purpose* in *inserting in the decree the provision complained of.* No one could have known, at the time the decree was entered, in what order the daughters of John E. Liggett would die. If Cora B. Fowler had been the last of them to die, the provision would not have made the slightest difference to anyone. If Dolly L. Kilpatrick had died before Cora B. Fowler, the appellant would not have been prejudiced by the provisions; and if Dolly L. Kilpatrick had been the last to die, the appellant could not have been hurt. *The circumstance that Cora B. Fowler died without issue before her sisters, and that Ella L. Wiggins outlived Dolly L. Kilpatrick, does not offer a substantial basis upon which to predicate an inference that the provision of the decree which appellant challenges was inserted through fraud, accident or mistake.*"

Moreover, the opinion was arbitrary also in treating said attorney, rather than the trial court, as legally responsible for the presence in the will decree of the disputed paragraph, although the trial judge had testified

that he examined the draft of decree, signed it, and handed it to the clerk for filing (R. 136), and said attorney had informed the court as *amicus curiae* that the trial judge "went over the decree thoroughly and adopted it as the decree of the court" (R. 290).

In law, it was *the court's* decree, adopted and entered as such with full knowledge by the trial judge of the issue made by the pleadings and trial briefs as between the daughters claiming fee titles and the minor defendants claiming contingent remainders following life estates in the respective daughters.

With the foregoing undisputed facts before the state supreme court in the instant case its decision is arbitrary in holding that the act of said attorney was unlawful and in their visiting on Mrs. Wiggins the consequence of said conduct, for which she was not responsible.

Point V. The raising of the federal question was timely, although not raised until the case reached the state supreme court, because:

(a) The suit being in equity, on the appeal said supreme court took it for consideration and decision, and decided it *de novo,* upon the record (pleadings and evidence) below. *Aden v. Dalton,* 341 Mo. 454, at 467; 107 S. W. (2d) 1070, at 1077, and cases cited.

(b) The primary rulings upon which said supreme court based its decision *de novo* against Mrs. Wiggins, giving mandatory legal effect to the quoted state statutes, excluding the intent of the entire will, were new in said decision of said supreme court, no such express or reasoned rulings having been made in the court below.

Said final decision was new also in that it avoided as between Mrs. Wiggins and Mrs. Kennard, and upon a petition charging fraud, accident or mistake, the paragraph in a decree rendered June 22, 1923, that entitled

Mrs. Wiggins to the disputed income, and said final decision did so although a comparison of it with the same court's two earlier opinions in this same case and on the same appeal, shows clearly that the court finally: held that there *was no actual fraud; withdrew its suggestion of constructive fraud;* made *no holding or ruling that Mrs. Wiggins was responsible for any accident or mistake* causing the disputed paragraph to be in the will construction decree, but held that unauthorized acts *of the attorney for Mrs. Kennard's guardian had caused it* to be there; and *made no express finding* or ruling that *the statement made by Mrs. Wiggins' counsel* (or any other counsel) in their briefs upon the appeal from the will decree *had in fact misled the then judges of the court to either affirm the will construction decree or to refrain from modifying it in accordance with Mrs. Kennard's present contentions.*

The other and supplemental rulings by said supreme court, that formed the further basis of its decision against Mrs. Wiggins in the instant case, were also made by said supreme court in its decision *de novo* upon the appeal in the instant case.

Said decision was a complete surprise to counsel for Mrs. Wiggins, in view of the facts: that the same division of said state supreme court had affirmed the will construction decree, and in its opinion in the later appeal in the *nunc pro tunc* case had stated that it had intended to affirm it; and upon the fact that in the instant case neither the decree of the court below nor the decision of said supreme court contained any express holding that the judges who had constituted said supreme court at the time the will construction decree was affirmed, had in fact been deceived by the statement of counsel for Mrs. Wiggins in their brief upon the appeal from the will decree, which statement is quoted in the opinion of said court in

the instant case, as a basis for its decision against Mrs. Wiggins.

(c) Her motions for rehearing, and motions to transfer the instant case to said court in banc, constituted her earliest opportunity to raise the federal question in respect of said decisions *de novo. Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U. S. 313, at 319-320; 74 L. Ed. 870, 875, 876; *Saunders v. Shaw,* 244 U. S. 317, at 320; 61 L. Ed. 1163, 1165-1166.

Therefore, the raising of the question was timely.

Point decided by the state supreme court but not argued here.

Recognizing the power of the state supreme court to adopt local rules for the construction of wills and aware that this Supreme Court of the United States has long treated doctrines governing the construction of wills (even those conveying personal property only) as matter local to the states, it is deemed inappropriate in support of the instant Petition for a Writ to here repeat at length a contention (believed to be valid) made for Mrs. Wiggins in said state supreme court and through all her litigation with Mrs. Kennard and Mrs. McIntosh, to the effect that the disputed paragraph in the will construction decree was a correct interpretation of the intent of the Liggett will,—because: (a) Neither of the Missouri statutes quoted in the instant opinion (Section 563, R. S. Mo., 1939, concerning "devises" of "real estate", and Section 3500, R. S. Mo. 1939, which defines the term "heirs of the body" of a person to whom is conveyed a remainder in real estate following a life estate) has any such direct or mandatory effect as the instant opinion of the state supreme court gives them in construing the Liggett will; (b) Said Section 563 expressly relates to devises of real estate, and said Section 3500 was enacted for the purpose of abolish-

ing in Missouri the "Rule in Shelley's case" which dealt only with "conveyances" of real property, and if said Rule is "resorted to in connection with personal property, it is only by way of analogy and *as a rule of construction in order to promote the intention*"; (*De la Vergne Refrigerating Machine Co. v. Featherstone*, 147 U. S. 209, at 222; 37 L. Ed. 138, at 142); and (c) The Liggett will conveying personal property only, if construed as a whole, clearly expresses the intent that the words "heirs of the body" were not intended to have the technical meaning given them by said statutes if applied to a conveyance of real estate, consequently the interpretation of the will as expressed in the disputed paragraph of the will decree, was right and therefore, Mrs. Kennard was not prejudiced by the presence of said disputed paragraph in said will decree.

A condensed argument on the above point (with authorities) will be found in Mrs. Wiggins' first motion for rehearing in the instant case (R. 256-271), supplemented by an explanation made by counsel who represented the guardian of Mrs. Kennard in the will case, of the legal grounds for his contention about the meaning of the will expressed in the disputed paragraph of the will decree, and contained in his "Suggestions" and "Supplemental Suggestions" filed in the state supreme court by him as *amicus curiae*, in the instant case (R. 292-297; 384-386).

Conclusion. The foregoing facts, authorities and argument are respectfully submitted in support of Petitioner's prayer that this Honorable Court grant a writ of certiorari in the instant case.

Respectfully submitted,

HARRY W. KROEGER,
DANIEL N. KIRBY,
Attorneys for Petitioner.

30

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

ELLA L. WIGGINS,
Petitioner,
vs.
ELIZABETH LIGGETT KENNARD,
Respondent.
No. 224.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR RESPONDENT, IN OPPOSITION.

PAUL BAKEWELL, JR.,
Counsel for Respondent.

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INDEX.

	Page
Opinion below	1
Petitioner's statement	1
Summary statement of matters necessary in considering the questions presented	2
Argument	7
Reasons why the writ should be denied	7
Facts not necessary in considering the questions presented by the petition, but which, in and of themselves, established the plaintiff's right to the relief granted by the decision below	13
In the original will construction suit there was no hearing on the devolution of the contingent remainders if a daughter should die without issue	14
The provision of the decree of the Circuit Court in the original case was the result of a "supposed agreement"	15
The subsequent statements, both by Mr. Reber and by Mr. Kirby, establish that the provision—the result of their "supposed agreement"—was wrong	16
Those counsel did not fully advise the Supreme Court	16
The briefs misled the Supreme Court	16
Why Mrs. Wiggins, petitioner here, did not present the provision of the decree to the Supreme Court of Missouri	17
Conclusion	17

Cases Cited.

Bennett vs. Mo. Pac. Ry., 105 Mo. 642..... 11
Duncan vs. Missouri, 152 U. S. 377, p. 383..... 10
Forbes vs. State Council of Virginia, 216 U. S. 396.... 8
Gay vs. Parpart, 106 U. S., p. 699..... 16
Gorman vs. Washington University, 62 Sup. Ct. Rep. 962 12
Harrison vs. Nixon, 9 Peters 483..... 8
Hayes vs. Manning, 263 Mo. 1, p. 46..... 8
Henderson vs. Koenig, 192 Mo. 690, p. 714..... 8
Holley vs. Georgia, 314 U. S. 576..... 8
Magill vs. Boatmen's Bank, 250 S. W. 41 (Mo. Sup.).. 9
McAllister vs. St. Louis Merch. etc. Ry. Co., 324 Mo. 1005 11
McCorquodale vs. Texas, 211 U. S. 432, p. 437..... 8
McGrath vs. Meyers, 341 Mo. 412..... 9
Oklahoma Pkg. Co. vs. Gas Co., 309 U. S. 4..... 7
Penn. R. Co. vs. Ills. Brick Co., 297 U. S. 447, p. 463.. 9
Phoenix Insurance Co. vs. Tennessee, 161 U. S. 174.... 7
Pierce Oil Co. vs. Phoenix Co., 259 U. S., p. 128..... 8
Pierce vs. Sumerset Ry., 171 U. S., p. 648..... 8
Robinson vs. Nick, 345 Mo. 305..... 10
Shields vs. Utah R. Co., 305 U. S., p. 182..... 14
St. Louis Land Co. vs. Kansas City, 241 U. S. 419..... 7
Union & Planters' Bank vs. Memphis, 189 U. S. 71... 7
Village of Grandview vs. McElroy, 318 Mo. 135..... 10
Wall vs. Parrot Silver Co., 244 U. S., p. 411..... 8

Statutes Cited.

Constitution of Missouri, Art. VI, Sec. 4 of the Amendment of 1890 10
Constitution of the United States, XIV Amendment.. 6
Rules of this Court, Rules 12 and 38.....1, 2, 7

SUPREME COURT OF THE UNITED STATES.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR RESPONDENT, IN OPPOSITION.

Opinion Below. The opinion of the Supreme Court of Missouri (not as yet published in the official reports) appears in 160 S. W. (2d) 706.

Petitioner's Statement. The Petitioner's Statement is deficient under Rule 12 and Rule 38 of this Court. It fails to disclose any ruling by the State Court upon any Federal question.

Petitioner's Statement omits essential facts and contains many inaccuracies.

Since this Court will consider only the questions specifically presented by the Petition (Rule 38), we shall, at this point, state only such facts which are omitted from Petitioner's Statement, and which may be necessary in considering the questions presented by the Petition.

Summary Statement Of Matters Necessary In Considering The Questions Presented. Both parties are citizens and residents of Missouri.

The Record, including the opinion of the Supreme Court of Missouri, shows that under the will of John E. Liggett, a resident of Missouri, as construed by the trial Court and the Supreme Court of Missouri, a one-sixth (⅙) interest in certain property had passed to his daughter, Dolly L. Kilpatrick, for her life, with a contingent remainder over on her death to the heirs of her body; that the said Dolly L. Kilpatrick had died on August 10, 1928, and that thereupon the remainder interest in said one-sixth (⅙) interest had vested absolutely in the two heirs of her body, Elizabeth Liggett Kennard (Respondent here) and Mary Lois McIntosh, a one-twelfth (1/12) interest in each (R., p. 247).

It also shows that Ella L. Wiggins (Petitioner here), a sister of Dolly L. Kilpatrick, claimed the said one-sixth (⅙) interest as against the heirs of the body of her deceased sister, and claimed the same under a provision of a decree of the Circuit Court, which had been entered while the three daughters of the testator, life tenants under his will, were alive, and which had purported to direct, while the life tenants were alive, how the then future and contingent interests under his will would go and pass, dependent upon future and contingent events, as such events might thereafter occur.

Said provision had purported to declare that on the death of Dolly L. Kilpatrick the contingent remainder in the said

one-sixth (⅙) interest should not vest in the heirs of her body, but should pass to her sister, Ella L. Wiggins, for her life, with a contingent remainder over on her death to parties not now known or ascertainable, to wit, "the then surviving issue of Ella L. Wiggins and Dolly L. Kilpatrick" (R., p. 245).

The purpose of the instant suit was to have the said provision of said prior decree declared void; to recover the one-twelfth (1/12) interest which had vested in the Plaintiff, as an heir of the body of Dolly L. Kilpatrick on August 10, 1928, and for an accounting of all income therefrom from and after the said date (R., p. 243).

No Federal question was raised in or decided by the Circuit Court. Its decree granted the relief prayed; adjudged the provision of the prior decree to be void; and specifically adjudged:

> "That at the time the decree was entered upon the records of the Circuit Court in the said suit to construe the will of John E. Liggett, all trusts had expired, and that the Court was without jurisdiction to adjudge at the instance of life tenants the interests of prospective contingent remaindermen before such interests had come into existence" (R., p. 81).

A motion for new trial (R., pp. 215-239) raised no Federal question and made no claim that the decision or decree of the trial Court had been arbitrary or violated any constitutional right.

On appeal, the case was fully briefed and argued before the Supreme Court of Missouri, Division No. 1 thereof, consisting of four Judges, aided by three Commissioners, all of whom concurred in the final judgment (R., p. 254).

No Federal question was presented to or was ruled upon by the State Supreme Court.

The opinion of that Court stated that the purpose of the instant suit was to have the provision of the prior decree declared void (R., p. 243).

The opinion also stated:

> "By all the rules of construction the term *heirs of the body*, as used in the Liggett will, paragraph above quoted, means the heirs of the body of a daughter, *at the time* of the death of the daughter, and not at the time of the death of the last surviving daughter. * * * Hence, when Dolly L. Kilpatrick died the 1/6 interest that came to her upon the death of her sister, Cora B. Fowler, vested in her daughter, Mary Lois Perry, now Mary Lois McIntosh, and the present plaintiff [Elizabeth Liggett Kennard], 1/12 interest in each" (R., p. 247);

and also stated:

> "* * * to refuse redress in the present case 'would be a reproach to the administration of justice'" (R., p. 254).

The mandate of the Supreme Court directed that the decree of the trial Court should be "in all things affirmed" (R., p. 243).

The Appellant then filed a motion for rehearing in the Supreme Court of Missouri, but said motion raised no Federal question whatsoever.

Said motion expressly waived the contention theretofore made that the provision of the original decree was binding. Here are the words of that express waiver, as set forth in her first petition for rehearing:

> "The instant Opinion presents two points for the present consideration of counsel for appellant in requesting a rehearing.
>
> "*First.* Whether the Court was free to construe the will because of the contention heretofore made, that the will construction decree is binding on plaintiff.

"*Second.* Was the Opinion correct in limiting the construction of the will to the purely technical point that the statutes were mandatory in determining the intent of the testator?

"Concerning the first point, and in order that there may be no misunderstanding about the sole purpose of this motion, we state at the outset that since it is evident from the Opinion that the Court thinks the will should be construed in order to do equity between the parties, Mrs. Wiggins and her counsel are willing to, and do hereby, waive this point * * *" (R., p. 255).

The said motion for rehearing was based solely upon the point that the Court had erred in construing the will. The motion stated:

"It is this point that constitutes the sole subject matter of this motion for rehearing" (R., p. 257).

It asked for a rehearing

"* * * solely upon the intent of the testator as disclosed by all the provisions of his will * * *" (R., p. 273);

and

"* * * prays that a rehearing be granted upon the construction of the will, as above suggested" (R., p. 274).

On December 16, 1941, the Supreme Court overruled said motion for rehearing without opinion (R., p. 351).

Of its own motion (R., p. 351) that Court modified its opinion in certain respects (R., p. 363), *but not with respect to the construction of the will.*

The Appellant then filed a second motion for rehearing and argued that the decision of the Supreme Court had been arbitrary and had deprived the Appellant of property

without due process of law, in violation of the XIV Amendment to the Federal Constitution (R., p. 364).

The Appellant then moved to have the cause transferred to the Court in Banc, stating as a reason for such motion that "the cause involves a Federal question" (R., p. 380).

Said motion did not state what the Federal question was, but referred to paragraphs II and III of the second motion for rehearing. Paragraphs II and III of said motion had urged that the decision of the Supreme Court had been "erroneous, arbitrary and unjust" (R., pp. 368-369). Neither of said paragraphs mentioned any Federal question.

On February 26, 1942, the Supreme Court overruled the second motion for rehearing and overruled the motion to transfer to the Court in Banc without opinion (R., pp. 392-393); and modified its own opinion, *but not with respect to the construction of the will* (R., p. 405).

The Appellant then filed a third motion for rehearing, in which the Appellant argued that the decision had been arbitrary in voiding the provision of the original decree (R., pp. 409 and 420) and in construing the will.

The Appellant then filed a second motion to transfer the case to the Court in Banc, but said motion asked for such transfer

> "* * * pursuant to the discretionary power vested in this Division by the provisions of the Constitution of the State of Missouri, Article VI, Amendment of 1890, Section 4 * * *" (R., p. 434).

The Court denied both of said motions without opinion (R., p. 441).

The Supreme Court never altered or modified its judgment of affirmance, as entered on July 25, 1941, which directed that the decree of the Circuit Court should be "in all things affirmed" (R., p. 243).

ARGUMENT.

Reasons Why The Writ Should Be Denied.

1) The Petition fails to comply with Rule 12 and Rule 38 and fails to show a substantial Federal question properly presented.

2) The Record shows that the only matters decided by the Circuit Court and the Supreme Court of Missouri were matters of local law:

a) that the provision of the prior decree of the State Circuit Court was without effect as res adjudicata; and

b) that under the will of John E. Liggett, a resident of Missouri, the Plaintiff, Respondent here, had become, on August 10, 1928, the owner of the property which she sought to recover.

A ruling by a State Court as to the effect of a prior decree of a Court of that State as res adjudicata does not present a Federal question.

St. Louis Land Co. vs. Kansas City, 241 U. S. 419;
Phoenix Insurance Co. vs. Tennessee, 161 U. S. 174,

where the Court said:

"* * * if the state court erroneously decides a question of law regarding the weight to be given one of its own judgments in its own courts and among its own citizens, that error is not subject to review by this court, because it constitutes no Federal question."

161 U. S., p. 185.

Such a decision is a matter of State or local law.

Oklahoma Pkg. Co. vs. Gas Co., 309 U. S. 4;
Union & Planters' Bank vs. Memphis, 189 U. S. 71.

The construction of a will for the purpose of ascertaining the intention of the testator is governed by the law of the testator's domicile.

Harrison vs. Nixon, 9 Peters 483.

3) The State Circuit Court and the State Supreme Court ruled that the provision of the original decree was void. It could not, therefore, be binding.

In her first petition for rehearing, the Appellant had expressly waived her contention that it was binding.

Under the law of Missouri, the Appellant's express waiver of the right to make that contention precluded her from claiming anything by reason of it afterwards. Under the law of Missouri, the waiver of a constitutional provision designed for the protection of a property right is valid and binding.

Hayes vs. Manning, 263 Mo. 1, p. 46;
Henderson vs. Koenig, 192 Mo. 690, p. 714.

It follows that Petitioner could not, after her express waiver, complain of the action of the Court in having voided the provision of the original decree.

A party may waive a right, which he might otherwise have under the Constitution of the United States, and the question whether he has or has not lost that right by his waiver is not a Federal one.

Pierce vs. Somerset Ry., 171 U. S., p. 648;
Wall vs. Parrot Silver Co., 244 U. S., p. 411;
Pierce Oil Co. vs. Phoenix Co., 259 U. S., p. 128.

4) It is too late to raise a Federal question for the first time in a petition for rehearing in a Court of last resort of a State after that Court has pronounced its final decision.

McCorquodale vs. Texas, 211 U. S. 432, p. 437;
Holley vs. Georgia, 314 U. S. 576;
Forbes vs. State Council of Virginia, 216 U. S. 396.

5) Since the highest Court of the State did not consider or decide any Federal question, this Court is without any jurisdiction to review its decision.

Penn. R. Co. vs. Ills. Brick Co., 297 U. S. 447, p. 463.

6) Where, under a well-established and reasonable practice, the highest Court of a State will not consider a constitutional question, because such question was not raised in the Circuit Court or properly presented to the highest Court, this Court is without jurisdiction.

Penn. R. Co. vs. Ills. Brick Co., 297 U. S. 447, p. 463.

The decision, which the Appellant (Petitioner) complains of as being arbitrary and unjust, was first rendered by the State Circuit Court.

On appeal to the State Supreme Court, she made no claim that such decision by the State Circuit Court had violated any constitutional right. Her appeal raised no Federal question.

Under the law of Missouri, a constitutional question must be raised at the first opportunity, and the Supreme Court will not consider any constitutional question unless it be timely and properly presented, that is, presented at the first opportunity and preserved in the record.

> "A constitutional question, in order to be available to a party litigant, must be raised at the first opportunity presented in the conduct of the case. If not so presented it will not be available so as to give this court jurisdiction."
>
> Magill vs. Boatmen's Bank, 250 S. W. 41 (Mo. Sup.).

See, also:

McGrath vs. Meyers, 341 Mo. 412,

and in order to properly present any constitutional question, the Section of the Constitution which has been violated must be designated, and the facts which constitute such violation must be narrated.

Robinson vs. Nick, 345 Mo. 305;
Village of Grandview vs. McElroy, 318 Mo. 135.

Therefore, under the established and reasonable practice of Missouri, the State Supreme Court could not consider any constitutional question, and, therefore, this Court is without jurisdiction.

7) The denial of the Appellant's motion to transfer this cause to the Supreme Court of Missouri in Banc, under Article VI, Section 4 of the Amendment of 1890 to the Constitution of Missouri, presents no question for review by this Court.

Said Section is as follows:

> "When the judges of a division are equally divided in opinion in the cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

This Court has specifically ruled that when a Federal question had not been suggested until after judgment and after an application for rehearing had been overruled (which is the exact situation in the instant case), the denial of a motion to transfer to the Supreme Court of Missouri in Banc

> "* * * was in no aspect equivalent to a decision against a right under the Constitution of the United States specially set up or claimed at the proper time and in the proper way."

Duncan vs. Missouri, 152 U. S. 377, p. 383.

The Supreme Court of Missouri has decided that the word "involving," as used in the Constitution in fixing the appellate jurisdiction of that Court, implies that a constitutional question was raised in and submitted to the trial Court, and that such Court had the opportunity to pass upon it.

Bennett vs. Mo. Pac. Ry., 105 Mo. 642.

See, also:

McAllister vs. St. Louis Merch. etc. Ry. Co., 324 Mo. 1005.

It will be noted that under the first clause of the above-quoted Section of the Constitution of Missouri, there are three conditions under which a cause must be transferred to the Court in Banc:

a) where the Judges of a Division are equally divided in opinion;

b) where a Judge of a Division dissents; and

c) where a Federal question is involved.

None of those conditions exists in the present case.

The second clause of said Section gives to a Division *discretionary* power to transfer a cause to the Court in Banc, as follows:

> "* * * or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Both of Appellant's motions to transfer the cause to the Court in Banc were based upon and addressed to the *discretionary* power of the Court.

Her first such motion

> "* * * prays that the Court exercise the *discretion* vested in it * * * by * * * transferring this cause to the Court in Banc" (R., p. 376). (Italic ours.)

Her second such motion asked that the Court

> "* * * transfer this cause to the Court en Banc pursuant to the *discretionary* power * * *" (R., p. 434). (Italic ours.)

When the Appellant has thus invoked the exercise of the *discretionary* power of a Court, the failure of the Court to exercise such discretionary power cannot, of course, violate any constitutional right of the Appellant.

8) Gorman vs. Washington University, 62 Sup. Ct. Rep. 962,

has no application.

In the Gorman case the opinion of this Court specifically stated that "a federal question is involved" and cited the provision of the Missouri Constitution; showed that no motion to transfer to the Court in Banc had been filed; and held that under the Code, the jurisdiction of this Court was restricted to review a decision

> "by the highest state court in which a decision could be had";

that the Missouri Supreme Court in Banc was the highest Court in which a decision of that Federal question could be had, and, therefore, in the absence of a decision on a Federal question by the Supreme Court in Banc, this Court was without jurisdiction.

In the instant case, however, no Federal question was presented.

No Federal question was ruled upon by the State Supreme Court.

The State Supreme Court decided only matters of local or State law, and, therefore, this Court is without jurisdiction because of the lack of any substantial Federal question properly and timely presented to the State Court.

Facts Not Necessary in Considering the Questions Presented by the Petition, but Which, in and of Themselves, Established the Plaintiff's Right to the Relief Granted by the Decision Below. The right of the Respondent under the will of her ancestor, as adjudged in this case by the Courts of Missouri, is in exact and complete accord with the intention of the testator, as that intention was stated by Mr. Daniel N. Kirby, counsel for Ella L. Wiggins, Petitioner here, to the Supreme Court of Missouri in the original will construction suit.

In the instant case the opinion of the Supreme Court states that in the original will construction suit Mr. Kirby had appeared for Ella L. Wiggins and her two sisters. The opinion quotes from his brief in the Supreme Court as follows:

> "From Mr. Kirby's Brief: 'In case a daughter should die during the trust period, then the remainder of the said subject matter with which the testator was here dealing—the equitable estate during the rest of the trust—should go over to the heirs of the body of the deceased daughter, and in default of such heirs, then to the survivors of the daughters, again with remainders over to the heirs of their bodies'" (R., p. 251).

The opinion also shows that on the appeal in the original will construction suit counsel had not informed the Supreme Court as to the provision in the decree, which contradicted that intention (R., p. 404).

In the instant case, Mr. Kirby, when placed upon the stand by the Plaintiff (Respondent here), testified as follows:

> "'I don't think, Mr. Bakewell, there is any doubt about what the phrase "heirs of the body" means technically in law. It means the people who will succeed on the death of an intestate ancestor'" (R., p. 111).

He also testified:

> " 'Q. When did Mrs. Kilpatrick die? A. She died in August of the same year.
>
> " 'Q. August, 1928? A. Yes.
>
> " 'Q. Did she leave heirs of her body? A. Yes.
>
> " 'Q. Who were they? A. One of them was her daughter, then Mrs. Perry, Lois Kilpatrick Perry, and the other is the granddaughter, who is the plaintiff in this case' " (R., p. 109).

It, therefore, appears that the Petitioner is asking this Court to review a decision by the highest Court of Missouri, which construed the will of her father in exact accord with his intention, as stated by her own counsel in his brief in the Supreme Court of Missouri; and which decision gave to the phrase "heirs of the body" the exact meaning which her own counsel testified that phrase "means technically in law."

In The Original Will Construction Suit There Was No Hearing On The Devolution Of The Contingent Remainders If A Daughter Should Die Without Issue. This Court has decided:

> "The hearing is the hearing of evidence and argument."
>
> Shields vs. Utah R. Co., 305 U. S., p. 182.

The Defendant (Petitioner) avers in her answer here that in the original suit said point was not argued in the Supreme Court of Missouri (R., p. 45). The Supreme Court of Missouri has stated that in the original suit it had not ruled upon that point (R., p. 359).

The Judge who presided at the trial of the original suit has testified that the point was not argued in the trial Court (R., p. 134), and Petitioner has so stipulated (Phys. Ex., p. *521).

Since there was no argument of the point, and since there was no hearing thereof, there could be no valid decision thereof.

The Provision Of The Decree Of The Circuit Court In The Original Case Was The Result of a "Supposed Agreement." The Judge of the trial Court, who had decided the original will construction suit, testified that "the substance of his finding" which was the "basis for the decree to be prepared by counsel" (R., p. 135) was the following:

"In the Circuit Court, City of St. Louis,

December 30, 1921.

"Ella L. Wiggins et al.
vs.
Mary Lois Perry et al.

Finding by the court construing the will of John E. Liggett, deceased, to the effect that the plaintiffs take life estates only under said will, with contingent remainders over in favor of the *heirs*, if any, *of the bodies of plaintiffs respectively*, per stirpes and not per capita; counsel for defendants to draft form of decree; decree to be entered upon said draft when approved by Court and filed.

(sgd.) Franklin Miller,
Judge."
(R., p. 134.)

It will be noted that said Finding did not attempt to decide how the contingent remainders would pass if a daughter should die without issue.

On that point, which had not been decided by the Circuit Court, Mr. Reber, who was counsel for the guardian ad litem of this Respondent (then a minor), and Mr. Kirby, counsel for Petitioner, "agreed" (Phys. Ex., p. *522), and,

as a result of their agreement, the provision which purported to deprive the heirs of the body of Dolly L. Kilpatrick of their estates appears as a part of the decree of the Circuit Court, which decree covers fifty-five printed pages (Phys. Ex., pp. *223-277).

In holding invalid a decree obtained under almost similar circumstances, this Court said that such a decree was "in outward semblance a decision of a court," but that "in essential character it is but the judicially recorded supposed agreement."

Gay vs. Parpart, 106 U. S., p. 699.

The Subsequent Statements, Both By Mr. Reber and By Mr. Kirby, Establish That the Provision—The Result Of Their "Supposed Agreement"—Was Wrong. In the instant case the opinion of the Supreme Court of Missouri establishes that in the will construction suit both Mr. Reber and Mr. Kirby had stated in their briefs in the Supreme Court that the testator intended that if a daughter should die without issue, her one-third (⅓) should pass in equal portions to her surviving sisters for life, with remainders over to the heirs of their respective bodies (R., p. 253). The opinion quoted the statements from the brief of Mr. Reber (R., p. 250) and from the brief of Mr. Kirby (R., p. 251).

Those Counsel Did Not Fully Advise The Supreme Court. In the instant case the opinion of the Supreme Court of Missouri establishes that in the will construction suit counsel had not advised the Supreme Court as to the paragraph in the decree, which was contrary to the intention (R., p. 253).

The Briefs Mislead The Supreme Court. That the briefs of counsel had caused an erroneous impression on the Su-

preme Court in the will construction suit is established by the opinion of the Supreme Court of Missouri in the instant case. That opinion said:

> "No Judge, by reading the briefs in the will construction suit appeal, would even suspect such a construction as that contained in the challenged paragraph of the decree" (R., p. 251).

Why Mrs. Wiggins, Petitioner Here, Did not Present The Provision Of The Decree To The Supreme Court Of Missouri. In her answer in this case, Mrs. Wiggins avers that in the will construction suit she did not present the paragraph of the decree to the Supreme Court of Missouri (R., p. 45) because it had held that if one daughter died without issue, leaving two sisters surviving, *the latter would take successive life estates* and she "did not desire to have that provision reviewed or altered" (R., pp. 45-46).

Thus in the clearest language the Petitioner avers that in the will construction suit she had not presented for review a provision of the decree of the trial Court, because she did not wish to have that provision reviewed or altered, but that provision had given to her (Mrs. Wiggins) a successive life estate in the very property which her counsel had told the Supreme Court the testator intended to go to the heirs of the body of her sister.

Conclusion.

The Record shows, therefore:

1) That no Federal question was properly and timely presented to the State Courts, and that no Federal question was decided by them.

2) That the Petitioner seeks a review of a decision by the Courts of Missouri, which construed the will of her father. But such decision construing the will is in exact

accord with her own statements as made to the Supreme Court itself in the original will construction suit, which had been filed by her.

3) That the Petitioner seeks a review of a ruling by the Supreme Court of Missouri, which had denied her contention that the provision of the prior decree was binding. But Petitioner's express waiver of that contention, as made in the Supreme Court of Missouri, deprives her of any right to a review by any Court of that ruling.

For the reasons set forth in the above brief, it is respectfully submitted that the Petition for Writ of Certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

PAUL BAKEWELL, JR.,
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

ELLA L. WIGGINS,
Petitioner,

v.

ELIZABETH LIGGETT KENNARD,
Respondent.

No. 224.

REPLY BRIEF FOR PETITIONER.

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INDEX.

Page

(1) The statements that no federal question was ruled upon by the State Supreme Court, or was properly or timely presented, are incorrect..... 1

(2) The fact that the State Supreme Court did not modify its judgment of affirmance entered July 25, 1941, during the later period while it was making substantial changes in the legal and factual grounds upon which to finally rest said affirmance, constitutes no reason why the instant petition should be denied..... 4

(3) The contention that by Petitioner's waiver contained in her motion for rehearing addressed to the first decision of the State Supreme Court, she forever waived her right to complain of the action of the State Supreme Court in the instant Kennard case, in affirming the decree of the state circuit court "voiding" the disputed paragraph of the will decree—is without merit..... 5

(4) The contentions that decisions by a state court on a question of res judicata, or on the proper construction of the will of a resident of Missouri are matters of local law and do not present federal questions, are irrelevant to the instant petition 7

(5) The contention for Respondent that the denial by the State Supreme Court of Petitioner's motion to transfer the instant Kennard case to said court in banc, "presents no question for review by this Court",—is without merit..... 7

(6) Respondent's brief, in contending that her rights under the will as adjudged in the instant Kennard case, are in accord with the intent of testator as stated by counsel for Petitioner in his brief in the State Supreme Court in the will construction suit,—repeats the same error inadvertently made by said court in its instant decision, although said error was clearly pointed out and corrected in Petitioner's supporting brief herein. 9

(7) The contention for Respondent, by using the quotation from the testimony of counsel for Petitioner at the trial below of the instant case, supplemented by the statement that counsel for Petitioner here asks this Court to review a decision of the State Supreme Court which gave to the phrase "heirs of the body" the exact meaning contended for by Respondent,—is incorrect and is likely to be misleading if not corrected... 10

(8) Respondent's contention that on the appeal in the will construction suit, counsel "did not inform" the State Supreme Court that the disputed paragraph was in the will construction decree, is refuted in Petitioner's supporting brief herein, at pages 18-26..... 13

(9) The statements that "the judge who tried the will construction suit testified that the devolution of the contingent remainders if a daughter should die without issue", was not argued in the trial court, and Petitioner has so stipulated, are not correct and are likely to mislead if not corrected 13

(10) Petitioner challenges the statement and contention in Respondent's brief to the effect that the presence in the will decree of the disputed paragraph therein, was legally attributable to "an agreement" between counsel for the guardian ad litem of Respondent and counsel for Petitioner, rather than to the judicial act of the circuit court in knowingly approving the draft of decree presented to Judge Miller by the said guardian's attorney who had been directed to draft the form of decree, and in causing said draft to be entered of record after Judge Miller had read it..... 16

Cases Cited.

Donnell v. Goss, 166 N. E. 725, at 726, 267 Mass. 444, at 446 4

Duncan v. Missouri, 152 U. S. 377, at 383 (38 L. Ed. 485, at 487-488)..... 8

Hewey v. Andrews, 159 Pac. 1149, at 1150, 82 Ore. 448, at 451 4

Statutes Cited.

Section 3 of Amendment of 1890 to Article VI of Constitution of Missouri; Rev. Stats. of Mo. 1939, Vol. I, pages 126c-127c 4

Section 1233, Rev. Stat. of Mo. 1939, Vol. I, page 347.. 5

Section 1234, Rev. Stat. of Mo. 1939, Vol. I, page 347.. 5

Text Cited.

4 C. J. S., pages 899-900, Section 440..... 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

ELLA L. WIGGINS,
Petitioner,
v.
ELIZABETH LIGGETT KENNARD,
Respondent.
No. 224.

REPLY BRIEF FOR PETITIONER.

This brief will reply to statements and contentions for Respondent, in substantially the same sequence adopted in Respondent's "Brief in Opposition" (also referred to as "Resp.'s brief").

All italics herein are ours unless otherwise indicated.

(1) **The statements** (Resp.'s brief, pages 1-7; 8-12; 17), **that no federal question was ruled upon by the State Supreme Court, or was properly or timely presented, are incorrect.**

(a) In Petitioner's motion for rehearing addressed to the first decision (opinion) of the State Supreme Court in

the instant case, she contended (R. 272-273): that the appeal then pending presented the first opportunity since the appeal from the will decree, to have said State Supreme Court construe the entire will and thus decide the intent of the disputed paragraph of the will which said court had not specifically construed in its opinion affirming the will decree; that unless the court should grant a rehearing of the appeal in the instant Kennard case and upon such rehearing should specifically construe the intent of the will from its four corners instead of resting its decision upon the cited Missouri statutes, as said court had done in its first decision in this Kennard case,—Petitioner *would not have had an adequate hearing* nor "her *full day in court*" in said case; and partly for this reason Petitioner prayed a rehearing. While the federal constitution was not expressly cited nor involved in the motion, the claim of a federal right was inherent in above contention and the primary purpose of said motion was to persuade the State Supreme Court to construe the will from all of its provisions, and thereby to give Petitioner her full day in court.

In the same motion (R. 273) Petitioner contended also, that Mrs. Kennard had had a Missouri statutory right (familiar to said court) during three years after she had attained the age of twenty-one years, to have the will decree reviewed, by the State Supreme Court. Respondent's failure to prove an adequate excuse for her own negligence in not having resorted to this available and adequate statutory remedy, was fatal in equity to a recovery by her in the instant Kennard case, (Point II of Petitioner's brief in support of the petition herein, pp. 8-12). The presence of these contentions in Petitioner's said motion for rehearing, was a warning to the State Supreme Court, that by ruling against them it would be acting arbitrarily and in violation of her constitutional rights.

The State Supreme Court denied said motion (R. 351),

and thereby ruled against said contentions, and in its first modified decision (of December 16, 1941; R. 351-363), said court gave no effect to either of said contentions.

(b) In Petitioner's motion for rehearing addressed to said first modified decision, she expressly invoked the due process clause of the federal Constitution, on the ground of arbitrary action in several respects, (R. 366-368; 369; 371-372), and prayed a rehearing for reasons including those involving "due process".

(c) Again, in Petitioner's motion to transfer to the court in banc (R. 375), filed coincident with her said last above motion for rehearing, she contended that the cause involved a specific federal question (R. 380), and asked a transfer partly on that mandatory ground.

The State Supreme Court denied both of said motions (R. 392-393), *thereby ruling* against said federal question.

(d) Again, in Petitioner's motion for rehearing, addressed to the second modified (final) decision of said State Supreme Court rendered February 26, 1942, (R. 393-405), she contended on various grounds (R. 409-419; 420; 423; and 424), that said decision had denied to her the due process of law to which she was entitled under the federal Constitution.

The State Supreme Court denied said motion on April 16, 1942, (R. 440-441), and *thereby ruled upon* said federal question.

(e) That the federal question was raised in time although not raised until the instant case had reached the State Supreme Court, is shown in Petitioner's supporting brief, (Point V, pages 32-34). The authorities cited and argument made there adequately refute the contentions *contra* in Respondent's opposition brief, which need not be further replied to here.

(2) **The fact** (Resp.'s brief, page 6) **that the State Supreme Court did not modify its judgment of affirmance entered July 25, 1941, during the later period while it was making substantial changes in the legal and factual grounds upon which to finally rest said affirmance, constitutes no reason why the instant petition should be denied.**

While the first and second editions of the decision of the State Supreme Court show the course of its progress in seeking grounds satisfactory to it upon which to rest its final decision and its said judgment of affirmance, there can be no doubt that its last decision rendered on February 26, 1942 (R. 392), constituted *the decision of the court* upon which said judgment of affirmance rests.

That the State Supreme Court so regarded its second modified opinion is shown by the fact that against the objection of counsel for Respondent to the filing of Petitioner's motion for rehearing addressed to said decision (R. 406), said court granted Petitioner leave to file said motion (R. 405). Moreover, it is in accord with reason and the general rule, that a substantial *(material)* change made by a court in its earlier form of a decision or judgment causes the amended form to become *the decision* or *judgment of the court;* 4 C. J. S. pages 899-900, Section 440 and cases cited thereto, including *Donnell v. Goss,* 166 N. E. 725, at 726, 267 Mass. 444, at 446; *Hewey v. Andrews,* 159 Pac. 1149, at 1150, 82 Ore. 448, at 451.

If, as Respondent seems to contend, the judgment of affirmance were to rest on the first opinion of the State Supreme Court, then it would have no valid support because said opinion was abandoned by said court, the judgment would stand of record without a supporting opinion, and would therefore violate the requirement of the State Constitution (Section 3 of Amendment of 1890 to Article VI of Constitution of Missouri; Rev. Stats. of Mo., 1939,

Vol. I, pages 126c-127c), which requires that "the opinion of each division shall be in writing, and shall be filed in the causes in which they shall be respectively made", etc.; it would also violate the requirement of Section 1233, Rev. Stat. of Mo. 1939, Vol. I, page 347, which provides that in each case determined by the Supreme Court "the opinion of the court shall be reduced to writing and filed in the cause, and shall show which of the judges delivered the same, and which concur therein or dissent therefrom"; also the requirement of Section 1234, Rev. Stat. of Mo., 1939, Vol. I, page 347, which provides that said opinion "shall always contain a sufficient statement of the case, so that it may be understood without reference to the record and proceedings in the same."

(3) **The contention** (Resp.'s brief, pages 4, 8, 18), **that by Petitioner's waiver contained in her motion for rehearing** (R. 255) **addressed to the first decision of the State Supreme Court, she forever waived her right to complain of the action of the State Supreme Court in the instant Kennard case, in affirming the decree of the state circuit court "voiding" the disputed paragraph of the will decree—is without merit.**

It overlooks the fact that said waiver was conditional, not absolute. It was expressly limited to a specified purpose, for which the State Supreme Court refused or failed to use it. It was expressly conditioned on the State Supreme Court doing in the instant case what it had not done in the appeal from the will decree, namely, specifically construing the disputed paragraph of the will from *all* its provisions. But said court refused to comply with said condition, so the waiver became ineffective. The stated subject matter of the waiver was (italics ours):

> "*Whether the Court was free to construe the will* because *of the contention* heretofore made, *that the*

will construction decree is binding on plaintiff" (R. 255).

And the language of the waiver was (R. 255-256):

> "Since it is evident from the Opinion that the Court thinks the will *should be construed in order to do equity between the parties, Mrs. Wiggins and her counsel are willing to, and do hereby, waive this point in order that this Court may do what it has not yet done, namely, construe the will from its four corners and specifically consider and determine the testator's intent as expressed in all of the provisions of the will particularly the provisions other than the use of the term 'heirs of the body'.*
>
> "While we are still of opinion, with great respect for the Court, that the decree is binding on plaintiff, *our views on this subject will be indicated in a separate motion,* but nothing contained in said separate motion is intended to prevent the Court from having complete freedom upon this appeal to construe the will as above suggested."

In harmony with the above conditional waiver, said motion for rehearing prayed that the court

> "Reset the case for argument solely upon the intent of the testator as disclosed by all the provisions of his will, in order that the Court may, upon briefs and argument, consider and specifically decide what Mr. Liggett intended by his will in respect of the disposal of the disputed share of the income. When this shall have been done Mrs. Wiggins will have had her full day in this Court, but it is respectfully submitted that she will not have an adequate hearing on this subject if the Opinion recently delivered remains in effect by adjudging that without regard to the real intent of the testator Mrs. Kennard is entitled to the disputed income solely because of the existence in the will of the term 'heirs of the body' " (R. 273).

It is respectfully submitted that upon the above record facts, there was no such unconditional waiver as Respondent contends in her opposing brief herein.

(4) **The contentions** (Resp.'s brief, pages 7-8) **that decisions by a state court on a question of res judicata, or on the proper construction of the will of a resident of Missouri are matters of local law and do not present federal questions, are irrelevant to the instant petition.**

None of the reasons or grounds set out in the instant petition (Petition herein, pages 33-36), rest at all upon any attempt to invoke the doctrine of res judicata, or to contend that the construction of state wills involves a federal question; (on the latter point, see Petitioner's supporting brief, page 34).

(5) **The contention for Respondent** (Resp.'s brief, page 10) **that the denial by the State Supreme Court of Petitioner's motion to transfer the instant Kennard case to said court in banc, "presents no question for review by this Court,"—is without merit.**

That the duty of said court to make such transfer was mandatory under the state constitution, is shown in Point I of Petitioner's supporting brief herein (pages 6-8).

The statement in support of Respondent's above contention (Resp.'s brief, page 11), that "*Both of Appellant's motions to transfer* the cause to the Court in Banc *were based upon and addressed to the discretionary power* of the court",—*is incorrect in fact,* being true in part only.

Petitioner filed two motions to transfer. The first such motion followed the first modified decision of the State Supreme Court. It accompanied Petitioner's motion for rehearing addressed to said decision; it invoked both the discretionary (R. 376-380) *and the mandatory* (R. 380) *power* of said court under the state constitution; and it

showed (partly by reference to said motion for rehearing) that a federal question was involved, (R. 379-380).

Because a federal question was involved it became the duty of said court, imposed by the mandate of the state constitution, *to forthwith make the transfer.* Such a transfer was a part of the due process prescribed by the state constitution and to which Petitioner was entitled as a matter of right. By denying said motion (R. 392-393) and thereby refusing to make the transfer, said court denied to Petitioner the due process of law guaranteed to her by the federal Constitution. This right arose upon said denial and still exists. It was not destroyed by the fact that the State Supreme Court abandoned its first modified decision and rendered its second modified decision. Said denial of this right, in and of itself, affords an adequate reason for the granting of the instant petition.

Petitioner's second motion to transfer followed the second modified decision of the State Supreme Court, and accompanied her motion for rehearing addressed to said final decision; (R. 407-430). Said motion for rehearing specified five different respects in which said decision had denied due process to Petitioner, (R. 409, 420, 423, 427 and 428), in violation of the federal Constitution.

Petitioner's accompanying motion to transfer (R. 433-434), expressly invoked the discretionary power only, of said State court, but *it also referred expressly to the reasons for a transfer set out in said accompanying motion for rehearing,* each of which *involved a federal question.* This made it the duty of the State Supreme Court to transfer the cause because in fact it involved a federal question, and when said second motion to transfer was filed, said court had not yet denied the motion for rehearing that accompanied it.

The decision in *Duncan v. Missouri,* 152 U. S. 377, at 383 (38 L. Ed. 485 at 487-488), cited in Respondent's brief

(page 10), is not in point here, because the final decision in the instant case had not been rendered when Petitioner's first motion to transfer was filed. The State Supreme Court was still in a position to grant said motion, and no motion for rehearing addressed to the final decision of the court had been filed or denied.

(6) **Respondent's brief** (pages 13, 14 and 16), **in contending that her rights under the will as adjudged in the instant Kennard case, are in accord with the intent of testator as stated by counsel for Petitioner in his brief in the State Supreme Court in the will construction suit,—repeats the same error inadvertently made by said court in its instant decision, although said error was clearly pointed out and corrected in Petitioner's supporting brief herein** (page 15; see point (1), pages 16-18).

An error inadvertently made by a court but clearly corrected in a brief by indisputable record references and adequate explanation, ceases to be inadvertent when repeated in an answering brief, presumably with knowledge of the correction which demonstrated that the statement in fact made by counsel for Petitioner in his said brief in the State Supreme Court *was not in accord* with the adjudication of Respondent's rights made in the instant case. On the contrary, the intent in fact stated by counsel for Petitioner was quite different (as shown in Petitioner's supporting brief herein, pages 16-18) from that given effect by the instant decision of the State Supreme Court in deciding this Kennard case.

Further concerning the contention made below for Petitioner about the intent of the will,—

(7) **The contention for Respondent, by using the quotation** (on page 14 of her opposing brief), **from the testimony of counsel for Petitioner at the trial below of the instant case** (R. 109), **supplemented by the statement** (page 14 of said brief) **that counsel for Petitioner here asks this Court to review a decision of the State Supreme Court which gave to the phrase "heirs of the body" the exact meaning contended for by Respondent,—is incorrect and is likely to be misleading if not corrected.**

Said quotation is incorrect because it *omits the context,* which shows that counsel for Respondent in thus examining his opponent, was attempting under the pretense of seeking information about the descendants of Liggett, *to commit the witness to an admission that the legal construction of the will being contended for on behalf of Respondent and denied on behalf of Petitioner, was correct.*

The part immediately preceding said quotation reads (R. 109):

> "Q. Now, Mr. Kirby, you were familiar with the family, having represented them for years—descendants of Mr. Liggett—John E. Liggett. You filed this suit for his daughters. His three daughters were Cora B. Fowler, Ella L. Wiggins and Dolly L. Kilpatrick, were they? A. Yes.
>
> "Q. And when did Cora B. Fowler die? A. She died in August, 19——
>
> "Q. (Interrupting) July, was it not? A. In July, 1928. I don't recall the exact date.
>
> "Q. Did she leave any heirs of her body? A. No.
>
> "Q. She did not? A. No.
>
> "Q. Did her two sisters survive her? A. Yes.
>
> "Q. That is, Mrs. Kilpatrick and Mrs. Wiggins survived her? A. Yes."

The part quoted in Respondent's brief, page 14, reads:

> " 'Q. When did Mrs. Kilpatrick die? A. She died in August of the same year.
>
> " 'Q. August, 1928? A. Yes.
>
> " 'Q. Did she leave heirs of her body? A. Yes.
>
> " 'Q. Who were they? A. One of them was her daughter, then Mrs. Perry, Lois Kilpatrick Perry, and the other is the granddaughter, who is the plaintiff in this case' " (R. 109).

And the part immediately following the above, reads (R. 109-111):

> "Q. Now Mrs. Elizabeth Scudder—who is now Elizabeth Scudder Kennard? A. Yes.
>
> "Q. And the other one was Mrs. Perry—Mary Lois Perry? A. Yes.
>
> "Q. She has since remarried, and she is now Mary Lois McIntosh? A. Yes.
>
> "Q. Then, Mr. Kirby, you filed an answer in this case, did you not? A. In which case?
>
> "Q. This instant case that we are now trying? A. I did.
>
> "Q. And in that answer, Mr. Kirby, *you denied that Mary Lois McIntosh and the plaintiff in this case became the heirs of the body of Dolly L. Kilpatrick?* A. I denied your technical contention on that point, because your technical contention was that a person couldn't become the heir of the body of an ancestor until the death of that ancestor had eliminated all questions of contingency about taking effect of the estate, and *I say that she isn't the heir of the body within the sense of vesting the remainders until Mrs. Wiggins, who is still the life tenant and as to the disputed portion of the income, until she dies,* she being *the last to survive of the three daughters of the testator.*
>
> "Q. But then, in point of fact, they did become—these two became the heirs of the body of Dolly Kilpatrick; that is, Elizabeth Scudder and Lois Mary Mc-

Intosh? A. *No, not within—I was answering your technical contention that they became the heirs of the body within the meaning of the will, upon the death of Mrs. Kilpatrick, and I am denying that technical contention because I say that they could not take the remainders; wouldn't vest until the death of the last survivor of the daughters.*

"Q. But you have testified that they became the heirs of her body? A. No, they were her—I have testified here that they were the prospective heirs who survived her, and they are still alive.

"Q. Just a moment. I asked you the question whether or not at her death Dolly L. Kilpatrick left heirs of her body? A. Yes, Mr. Bakewell. *I wasn't thinking that you were trying to ask me a technical question and then trying to hold me to the technical answer meaning* in any manner. In the answer filed in this case I was denying your technical contention on that point.

"Q. *I am asking as a matter of fact concerning the family history here,* and a family which you have represented for years. I am asking you whether or not Dolly L. Kilpatrick at the time of her death left heirs of her body? A. *She left heirs, but they were not heirs of the body within the meaning of this provision of the Will.*

"Q. In order to clarify your answer, Mr. Kirby, what do you mean by 'heirs of the body' with that distinction? A. *I mean they were not heirs of the body within the meaning of all of the provisions of the Will as to when they could take the remainders.*"

It is submitted that the above quoted testimony of counsel for Petitioner, fairly interpreted, gives no support to the contention for Respondent that by said testimony counsel for Petitioner admitted the correctness of Respondent's contention about the proper construction of the Liggett will.

(8) **Respondent's contention** (Brief, pages 13-26) **that on the appeal in the will construction suit, counsel "did not inform" the State Supreme Court that the disputed paragraph was in the will construction decree, is refuted in Petitioner's supporting brief herein, at pages 18-26.**

In the same part of Petitioner's supporting brief, there is a refutation of the additional erroneous statement made in Respondent's brief,—that the briefs of counsel in the appeal from the will decree, "*misled*" the State Supreme Court.

Petitioner's supporting brief (at pages 18-26) proves from indisputable record evidence, that the judge who wrote the decision in the will construction case was not misled, and could not have been misled, into affirming the will decree.

(9) **The statements** (Resp.'s brief, at foot of page 14) **that "the judge who tried the will construction suit testified that the devolution of the contingent remainders if a daughter should die without issue," was not argued in the trial court** (R. 134), **and that "Petitioner has so stipulated** (Phys. Ex. *521)," **are not correct and are likely to mislead if not corrected.**

The State Circuit Judge (Hon. Franklin Miller), who tried the will construction suit, testifying as a witness about occurrences at said trial, and after naming an attorney who had "appeared at the arguments", said (R. 134):

> "On December 17, 1921, it was *argued at great length* by many able counsel. The only question argued was whether the daughters of the testator took life estates or estates in fee simple. Counsel did not argue the nature or limitations of the estates in remainder after the life estates of the daughters."

Obviously the arguments here referred to were *oral* arguments made during the trial in the circuit court. But it is also a fact, undisputed of record, that in said circuit court and cause, and in the trial brief filed by the attorney for the guardian ad litem of Mrs. Kennard, he made the following contention or argument concerning the devolution of the share of a daughter who might die without issue, viz.: that it was the intent of the Liggett will that upon the death of testator's widow, the trustees should,

> "Further hold said stock in trust for the sole benefit and behalf of his three daughters in equal portions, share and share alike, for and during their natural lives, with remainder over on the death of each daughter of that one's share to the heirs of her body absolutely, per stirpes; and *if none, then to pay the income from such share to his surviving daughter or daughters for life, such share on the death of the last surviving daughter to go to the heirs of the body of such as should die leaving such issue*" (Phys. Ex. *441-442).

This was part of said attorney's *argument* made to the circuit court concerning the intent of the will. It supported a similar contention made in his answer filed in the circuit court in the will construction suit on behalf of Mrs. Kennard (Phys. Ex. *213-214).

Moreover, during the trial in the state circuit court of the instant suit, and while counsel for Respondent was examining counsel for Petitioner, the following occurred, (R. 132-133):

> "Q. Well, Mr. Kirby, as attorney for Mrs. Wiggins, you have heretofore signed a stipulation, have you not, which states that the devolution of this property in the event a daughter should die without issue *had not even been discussed* in the case before Judge Miller? A. Oh, you are referring—you are referring to *oral*

argument. I have tried to remind you that Mr. Reber's brief and Mr. Reber's answer in that case in my opinion settled this controversy.

"Q. I understand you signed such a stipulation; *you said this matter hadn't been discussed* before Judge Miller? A. Read the stipulation as to whether or not it meant oral argument."

[Counsel here read from said "stipulation of facts," as shown below in single quotes, but in doing so made certain slight changes in the wording, and also *omitted the following sentence* that immediately preceded the excerpt thus read by him into the record (Phys. Ex. *521):

"That *said cause came on to be heard* and *was duly tried and submitted* upon the issues made by the pleadings *and upon the* evidence, briefs and *oral* arguments"]. The part read into the trial record follows:

"Q. 'That at the trial of said cause in the Circuit Court the only question that was argued was whether the daughters of the testator took life estates or estates in fee simple, but in the argument of this question, the entire scheme or plan of the will and all its provisions throwing light on the design and specific intent of the testator were also drawn into consideration and were discussed, but that there was no argument made to the Court as to the nature or limitations of the estates in remainder after the life estates of the daughters in case the Court should say that the daughters took life estates; that later a motion for a new trial and arrest of judgment were submitted without argument.' You signed a stipulation so reciting? A. *Yes, that refers, as both of us understood, to oral argument,* because the same stipulation contained a memorandum about the nature of Mr. Reber's answer.

"Mr. Bakewell: I see. I think that is all, Mr. Kirby" (R. 132-133).

The stipulation was signed by present counsel for respondent herein (Phys. Ex. *522); it was filed in the fed-

eral district court in Mrs. McIntosh's first federal suit, *Perry v. Wiggins* (Phys. Ex. *510).

It is submitted that the foregoing portions of the record prove the complete fallacy of said statements in Respondent's opposing brief.

(10) **Petitioner challenges the statement and contention in Respondent's brief** (pages 15-16) **to the effect that the presence in the will decree of the disputed paragraph therein, was legally attributable to "an agreement" between counsel for the guardian ad litem of Respondent and counsel for Petitioner, rather than to the judicial act of the circuit court in knowingly approving the draft of decree presented to Judge Miller by the said guardian's attorney who had been directed to draft the form of decree, and in causing said draft to be entered of record after Judge Miller had read it.**

The impression sought to be created by the said statement and contention, supplemented by the paragraphs and citation at the top of said page 16, is that the alleged agreement between counsel was of such collusive and deceptive nature as to render said paragraph invalid as a fraud on said court, when exposed to later judicial scrutiny.

A summary statement of the circumstances showing how said disputed paragraph came to be inserted into the draft for decree drawn by counsel for Respondent, is made in Petitioner's petition for a writ herein (page 11, last paragraph, through page 14, first paragraph). From said summary statement it is clear that the method adopted in drafting and settling the terms of the decree were strictly in accord with the customary practice in said circuit court, of preparing, adopting and entering complicated decrees in equity cases. There was not the slightest impropriety or irregularity or conspiracy or concealment in what was

done. Nothing was concealed from other counsel, nor from Judge Miller, nor misrepresented to him. The testimony of Judge Miller appears at R. 134-137. The testimony of counsel for Mrs. Kennard's guardian, who drew the decree and submitted it to Judge Miller for the latter's approval, appears at R. 162-163. The testimony of counsel for Mrs. Wiggins appears at R. 101-102, supplemented at R. 129, by his testimony that he did not write the decree. In addition, the present counsel for Mrs. Kennard and counsel for Mrs. Wiggins signed and filed a written "stipulation of facts" on which was tried Mrs. McIntosh's first federal suit and in which stipulation the facts were stated in detail (Phys. Ex. *521-522). Furthermore, the attorney who represented Mrs. Kennard's guardian ad litem, made additional statements in his filed "Suggestions" as amicus curiae in the State Supreme Court in the instant case, (R. 290; 298-299).

If counsel for Mrs. Wiggins had agreed with counsel for Mrs. Kennard's guardian that the form of the decree approved by them would be entered and *if it had been entered pursuant to such agreement,* the decree as so entered would as to them have been *"a consent decree."* But counsel for Mrs. Kennard, in said "stipulation of facts" agreed that Mrs. Wiggins' counsel *"did not consent to the entry of the decree"* (Phys. Ex. *522).

It is significant that the above contention for Respondent was before the State Supreme Court in the instant Kennard case, and although said court, as shown by its successive decisions herein, was seeking some valid ground on which to sustain the decree of the state circuit court in favor of Mrs. Kennard and against Mrs. Wiggins, the State Supreme Court did not even mention, much less adopt or sustain, the above contention. It is respectfully submitted that the above cited facts of record, show that

said contention is an effort to distort into collusive and fraudulent conduct, the entirely proper, open and customary method in Missouri of drafting and settling complicated decrees in equity. The contention should fail for this additional reason.

In conclusion, the attention of the Court is directed to the fact that the opposing brief herein for Respondent fails to answer the contention in Petitioner's supporting brief that the decision and judgment of the State Supreme Court in the instant Kennard case unlawfully deprived Petitioner of her property without due process of law, although the undisputed record, and the final decision of said State Supreme Court, show clearly that Petitioner committed no wrong against Respondent.

Respectfully submitted,

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